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Buyers' Cartels – Two Differing Opinions by the Competition Commission of India

Hartej Singh Kochher*

Abstract

The author, by way of this study, would shed light on how the CCI has given diametrically differing views in two separate cases on the issue of "buyers' cartels". The two cases would be contrasted and studied and the legal rationale behind them would be understood. Further, this paper will also dwell on the proposed change under the Draft Competition (Amendment) Bill, 2020 to amend the definition of a 'cartel' under the Act. The impact of the proposed change would be gauged and finally, the author will offer his suggestions on the "buyers' cartels' jurisprudence of the CCI and the proposed change to the definition of a 'cartel'.

Critical Analysis

Competition Commission of India (hereinafter referred to as "CCI"), is the regulatory expert body[1], tasked with addressing competition concerns in the Indian market. It was constituted under the Competition Act, 2002. According to the author, the CCI, in its domain, has functions which can be divided into four broad spheres- (i) to prevent anti-competitive agreements in the market; (ii) to prevent the abuse of a dominant position enjoyed by an enterprise in a market; (iii) to regulate combinations which are proposed and finally; and (iv) competition advocacy.

Under the first sphere, i.e. to prevent anti-competitive agreements, the CCI has powers to strike against "*Cartels*". The Competition Act gives us an *inclusive* definition of a cartel, stating that it "*includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*".[2]

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1 The status of the CCI as a regulator performing roles which are administrative, quasi-judicial and that of an expert body in nature has been emphatically stated in *Brahm Dutt v. Union of India*, A.I.R. 2005 S.C. 730 and more recently, in *Mahindra Electric Mobility Ltd. v. CCI*, (2019) SCCOnline Del 8032.

2 Section 2(c), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

Hence, according to this definition, an '*agreement*' which points to some '*collusion*' is necessary to constitute a cartel.

Section 3 of the Competition Act, is the operative provision, which explicitly prohibits '*anti-competitive agreements'*.[3] One such sub category of anti-competitive agreements which are frowned upon are agreements between parties engaged in "*identical or similar trade of goods or provision of services*".[4] It is under this sub-category, that the Act, explicitly mentions any agreement between 'cartels' to be presumed as an anti-competitive agreement[5] if it satisfies any of the following circumstances- (i) it fixes prices; (ii) it fixes output; (iii) it divides the market; or (iv) it enables bid rigging or collusive bidding.[6]

While the CCI has adjudicated upon various cases which deal with 'cartels' per se, there have only been two instances[7], where the regulator has been specifically called on to settle action against what could be called "*buyers' cartels*".

It was in *Pandrol Rahee Technologies Pvt. Ltd. v. Delhi Metro Rail Corporation and Ors.*[8] (hereinafter referred to as "*Pandrol*") that a question pertaining to a buyers' cartel, came up before the CCI for adjudication, for the very first time. Anti-competitive conduct was alleged by the informant, in light of subsisting agreements, by the five Opposite Parties in the procurement of the *"rail fastening systems for ballastless track in metro rails"* in India. An argument for abuse of dominant position was also advanced.

It was claimed that the Delhi Metro Rail Corporation (DMRC) had not initiated any tendering process for the said procurement. This tendering process was stated to be an incumbent responsibility upon a public body. Other Metro rail projects in different cities were also recommended the procured products by the DMRC.

In the final decision, the procurer was adjudged to be a consumer i.e. a buyer, per the majority's opinion, since the "*production chain can be said to end where the last transaction takes place and after which point the utility of the product or service is consumed by the person who buys it*". This criterion, of being the end consumer, of a good or service, was satisfied by the DMRC and the other metro projects. As per the opinion, even though this

3 Sections 3(1), 3(2), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

4 Section 3(3), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

5 The burden, hence, shifts on the parties accused thereof to disprove.

6 For a more detailed discussion on the conditions, please see Sections 3(3)(a), 3(3)(b), 3(3)(c), 3(3)(d), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

7 In the research of the author.

8 Case No. 3 of 2010 (Competition Commission of India, 07/10/11). One order given by the majority and one dissenting order. This study will only be confined to the majority order as the dissent did not address any of the issues relevant for this study.

was a public body, it was an entity which was a representative consumer on behalf of the public, and a consumer was expected to know what was best for him. Consequently, a consumer could freely select a product by exercising consumer choice.

The legal rationale advanced was that the considerations stated under Section 19(3), which are taken into account to determine appreciable adverse effect on competition, did not contemplate a purchaser to be able to cause competitive harm. Further, Section 3(3), categorically, states that sub-units forming a cartel, are required to be engaged in "*identical or similar trade*"[9], and the term '*acquisition*' was not stated in the definition of '*trade*'[10] under the Act. Hence, any sort of acquisition i.e. purchase, did not fall in the definition of a 'trade' and thus, no purchaser/ consumer could be brought under the bounds of Section 3(3). As a consequence, a buyers' cartel would be outside the regulatory jurisdiction of the CCI.

After some considerable gap, a second case pertaining to buyers' cartels came up for hearing before the CCI in the form of *XYZ v. Indian Oil Corporation Ltd. and Ors.*[11] (hereinafter referred to as *"XYZ"*). As per the information supplied by the informant, the Opposite Parties had allegedly indulged in collusive/ joint tendering. Three public sector oil companies were the Opposite Parties, and the tender was concerned with procurement of services of Tank Trucks for transportation of LPG cylinders. The CCI, while detailing the factual matrix of the case, clearly expressed that *"...the Commission notes that in the present case the Informants have alleged an existence of a buyer/purchase cartel. Section 3(1) and 3(3)(a) covers both sellers' as well as buyers' cartel..."*

According to the decision, Section 3(1), which prohibits anti-competitive agreements, explicitly used the term '*acquisition*'. Pricing fixing[12] by a cartel is to be treated as a per se violation under Section 3(3). Hence, it was clearly mentioned in the verbiage of the Act itself that fixing of a purchase price by a cartel was a violation. As a result, buyers' cartels came under the jurisdiction of the CCI.

However, taking into account a peculiar aspect of buyers' cartels, it was observed, *"... the creation of 'buyer power' through joint purchasing agreements may rather lead to direct benefits for consumers in the form of lower prices bargained by the buyers"*. Thus, *"... treating buyers' arrangement/cartel, at par with sellers' cartel may not be appropriate"*. Hence, each case, with its unique factual matrix, needs to be adjudicated upon individually while taking the possible benefits to a consumer of a buyers' cartel into account.

9 Of either goods or services.

10 Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

11 Case No. 5 of 2018 (Competition Commission of India, 04/07/18).

12 Section 3(3)(a), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

The CCI did not venture to discuss the definition of "*trade*" as it had referenced in the *Pandrol* case. To the author, the reasoning given in *Pandrol* seems to stand on firm legal footing and the decision in *XYZ* is erroneous.

Section 3(3) of the Act states the "*identical or similar trade*" criteria and even though the Opposite Parties in *XYZ* were in the identical/ similar trade, they were '*acquiring*' the service (of the trucks) for their consumption, thereby, becoming end users of the service. They were not going to further 'trade' in the services they acquired, thus, satisfying the letter of the law, strict interpretation followed in *Pandrol*. A consumer, as per a strict reading of the Act, cannot be interpreted to be a constituent of a cartel. Buying goods or services for final consumption cannot be stated to be a '*trade*' under the Act.

An even more perplexing omission is regarding the absence of *Pandrol* in the *XYZ* order. This situation followed even after *Pandrol* being the only other case the CCI had inquired into pertaining buyers' cartels. This leads to a scenario where precedent ceases to be of concern and ad-hoc adjudications can be made in any matter. If a previously decided case is referred to explicitly, its decision-making rationale can be relooked at. It can be affirmed fully or partially or overruled fully or partially. It gives a certain stability to the jurisprudence.

In the present scenario, we have two wildly differing opinions regarding the ability of the CCI to inquire into buyers' cartels. If *XYZ* is the correct law, then the Opposite Parties in the *Pandrol* matter slipped through the jurisdiction of the CCI. If *Pandrol* is correct, the CCI should have not gone beyond the preliminary inquiries in *XYZ,* after it realized that the case pertained to buyers' cartels.

Further, if the previous case was referenced and specifically overruled, a situation with two diametrically opposing decisions in the same realm would not have come into being. It has been held by the Apex Court itself that "*The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs".*[13] In light of the two different perspectives on the issue of buyers' cartels, it is the individual, who cannot gauge the impact of his transaction and thus, cannot determine whether he or she is falling foul of the Competition Act or not.

In the opinion of the author, a possible line of argument in *XYZ,* to justify the inclusion of a buyers' cartel within the definition of a 'cartel' under the Act, could have been the fact that

13 *Union of India & Anr. v. Raghubir Singh (Dead) by LRs. Etc.*, A.I.R. 1989 S.C. 1933.

the definition given and stated in full above, is inclusive in nature and thus, not exhaustive.[14] Hence, a buyers' cartel, can be envisaged within the definition of a cartel itself. However, no such reasoning was pursued. In spite of this, the hurdle created by the definition of 'trade' not containing the word 'acquisition' remains. It becomes pertinent to note that the definition of 'trade' furthers that '*control of goods'* constitutes a trade.[15] When a buyer buys a good, it comes within his or her control, hence, a consumer could be brought under the definition of trade. This would, plainly, be quite a stretched legal reasoning.

Adding to the intrigue is the recommendation of the Competition Law Review Committee (CLRC) to incorporate the word 'buyer' in the definition of a cartel.[16] Based on the recommendations of the CLRC, a Draft Competition (Amendment) Bill, 2020 has been put out in the public domain to seek comments from the public at large. The Draft Bill, in consonance with the recommendations of the CLRC has duly proposed to amend the definition of 'cartel' in Competition Act, 2002 by incorporating the word 'buyer' in it.

Under Section 2(c), the definition of a cartel as proposed to be amended by the Draft Bill would be (with proposed amendments underlined and in italics):

> *"cartel" includes an association of producers, buyers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit or control or attempt to limit or control the production, distribution, sale or price of, or, trade in goods or provision of services."*[17]

However, no amendment is proposed to the definition of 'trade'. Hence, the questions raised by the reasoning in the *Pandrol* order still remain. The CLRC, in its report while suggesting the said amendment, only referenced the *XYZ* decision, and stated that in its decisional practices, CCI has recognised that Section 3(1) and 3(3), cover both buyers' and sellers' cartels.[18] Thus, the *Pandrol* decision seems to have been completely discarded and the way forward seems to be in sync with the reasoning advanced in *XYZ*.

14 Section 2(c), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

15 Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

16 Ministry of Corporate Affairs had constituted a Competition Law Review Committee ("CLRC") in 2018 to ensure that the Act *"is in sync with the need for strong economic fundamentals". Government constitutes Competition Law Review Committee to review the Competition Act*, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:00 AM), https://pib.gov.in/PressReleseDetail.aspx?PRID=1547975.

17 Draft Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (Apr. 28, 2020, 11:00 AM), http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.

18 *Report of the Competition Law Review Committee*, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:05 AM), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.