Buyer's Cartels: An Amendment too Late

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Abstract

This legislative comment aims to examine a proposed amendment suggested by way of the Draft Competition Law (Amendment) Bill, 2020 to the Competition Act, 2002 to include within the definition of a 'cartel' under the Act, a 'buyer's cartel'. This study will delve into the decisional practices of the Competition Commission of India, while dealing with buyer's cartels and offer insights into the same. It will also discern as to why the amendment was needed. The amendment process and the rationale for the amendment will be elucidated. Finally, the author will offer his comments on the same.

I. Buyer's Cartels: An Amendment Too Late

The Competition Commission of India (CCI), is a regulatory body established under The Competition Act, 2002 (the 'Act', hereinafter), which became functional in mid 2009.[2] One of the mandates of the CCI, as enshrined u/s. 3 of the Act, is to prohibit anti-competitive agreements. It is u/s. 3(3) of the Act that cartelization is dealt with. It is considered to be a "per se" violation[3] of the Act, if a cartel, by way of an agreement with its cartel members, fixes prices, output, divides the market, or indulges in bid rigging/collusive bidding.[4]

Since 2009, CCI as the sectoral regulator has evolved a distinct competition law jurisprudence, which has been accompanied by the decisions of the Appellate Body[5] and the Constitutional Courts. In 2018 it was felt by the Government that there was a need to initiate reforms through the learnings of the functional years of the CCI. In furtherance of this, a 'Competition Law Review Committee' (CLRC), was structured to confirm that the "Legislation is in sync with the needs of strong economic fundamentals,"[6]and to ensure that competition law was "strengthened, and re-calibrated".[7]

The brief given to the CLRC included a review of the present Competition Law framework, in light of the dynamic business environment.[8] The CLRC submitted its report in August 2019.[9]

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[2] This was necessitated due to the constitutional challenges to various provisions of the Act, and subsequent amendments brought about in the year 2007, as a result. See Brahm Datt v. Union of India, (2005) 2 SCC 431.

[3] Presumed violation. In this case, the burden of disproving the violation is on the alleged violator.

[4] Competition Act, 2002, No. 12, Acts of Parliament, 2002§ 3(3).

[5] Earlier, the Competition Appellate Tribunal and now, the National Company Law Appellate Tribunal.

[6] 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.

[7] Ibid.

[8] Ibid.

[9] Report of the Competition Law Review Committee submitted to Union Finance and Corporate Affairs Minister, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:05 AM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=192629.
Full report available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

And, acting on the counsel of the Report, a Draft Competition Law (Amendment) Bill, 2020 was published, by the Ministry of Corporate Affairs to invite suggestions from the public at large.10

In the Draft Bill substantial amendments to the law have been suggested. For this study, the focus will only be on the amendment proposed to s. 2(c) of the Act, which defines 'cartel'. The proposed change to the definition aims to bring within the purview of the Act, "buyer's cartels". This was warranted due to a lacuna in the law, which meant that if a case came up before the CCI for adjudication, which involved a cartel of buyers, it would be powerless to Act. Even if there would be an appreciable adverse effect on competition,11 the CCI's hands would be tied.

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

> ""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."

As can be discerned, the specific intent of the proposed amendment is to bring within the ambit of a 'cartel', a buyer's cartel. The CCI has dealt with cases in its formative years, which pertain to buyer's cartels. The determination for the jurisdictional intervention of the CCI in such cases has been distinctly varied, which merits discussion to understand the need for such an amendment.

The first such case which came up before the CCI for adjudication was *Pandrol Rahee Technologies Pvt Ltd. v. Delhi Metro Rail Corporation and Ors*.12The informant had alleged anti-competitive conduct, by virtue of agreements and abuse of dominance, by the five Opposite Parties in the procurement of the "rail fastening systems for ballast less track in metro rails" in India. It was alleged that there was no tendering process initiated by the Delhi Metro Rail Corporation (DMRC) for the procurement, which was incumbent upon a public body. The DMRC had even recommended the products it had procured to other Metro rail projects in different cities as well.

As per the majority's view, the procurer was a consumer, i.e., a buyer, 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". The DMRC and the other metro projects had satisfied this criterion. In this case, there was a presumption that the consumer knew what was best for him, even though it was a public body; it was an entity which was a representative consumer on behalf of the public. Hence, the consumer could freely exercise consumer choice and freely select a product.

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10 Draft Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:10 AM), http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf

11 Appreciable adverse effect on competition is the marker used by the CCI to determine whether an agreement is anti-competitive. It takes various factors into account which are given under Section 19(3) of the Competition Act, 2002.

12 Case No. 3 of 2010, Order dated 7th Oct., 2011. (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.)

The legal reasoning given was that the factors enumerated u/s. 19(3) to determine the appreciable adverse effect on competition, did not envisage a consumer to be able to cause competitive harm. Also, s. 3(3) specifically stated that entities forming a cartel, needed to be engaged in "identical or similar trade", and the term 'acquisition' was not stated in the definition of 'trade'13 under the Act. Hence any acquisition i.e. purchases, did not qualify as trade and flowing from that, no consumer could be brought under the ambit of s. 3(3). Thus, a buyer's cartel would be outside the jurisdiction of the CCI.

In the case of *XYZ vs Indian Oil Corporation and Ors.*14, the informant alleged that the Opposite Parties had indulged in collusive/joint tendering. The Opposite Parties were three public sector oil companies and the tender pertained to procuring the services of Tank Trucks for transportation of LPG cylinders. While delving into the merits of the case, it was explicitly stated 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 order, s. 3(1), which puts a bar on anti-competitive agreements, clearly mentioned the term '*acquisition*'. Also, pricing fixing,15 given as a per se violation u/s. 3(3) clearly mentions that fixing of a purchase price is a violation. Consequently, buyers' cartels could be dealt with by the CCI.

However, striking a cautious note, 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*". Consequently, *"…treating buyers' arrangement/cartel, at par with sellers' cartel may not be appropriate"*. Thus, each case needs to be adjudicated upon its unique factual matrix.

The CCI did not even mention the definition of "trade" as it had referenced in the 'Pandrol' case. To the author, the reasoning given in 'Pandrol' seems to stand on a firm legal footing. The decision in 'XYZ' is flawed. As per a strict, "letter of the law" interpretation, s. 3(3) mentions the "identical or similar trade" criteria and even though the Opposite Parties were ostensibly in the same trade, they were '*acquiring*' the service (of the trucks) for their final consumption, thereby, becoming consumers of the service. As per the scheme of the Act, the consumer cannot be construed to be a part of a cartel. Buying goods or services for final consumption cannot reasonably be stated to be a 'trade'.

The CLRC was mindful of the fact that there was no explicit mention of *"buyers"* in the definition of a cartel. The committee took cognizance of the *XYZ* case and stated that the absence of such verbiage had not prevented the CCI from recognizing buyers' cartels. But the report did not refer to the 'Pandrol' case. It recommended the addition of the term "buyers" in s. 2(c) of the Act, to bring the definition in line with the decisional practices of the Commission and to make the definition more comprehensive.

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13 Competition Act, 2002, No. 12, Acts of Parliament, 2002, § 2(x).
14 Case No. 5 of 2018. Order dated 4th July, 2018.
15 Competition Act, 2002, No. 12, Acts of Parliament, 2002, § 3(3)(a).

The author would like to point out that the 'Pandrol' case was decided in 2011, and the *XYZ* case in the year 2018. This is a gap of seven years during which such an amendment could be proposed and adopted. The opinion in *XYZ* is correct to the end that buyer cartels may reap benefits for the consumer. But in the odd chance, that they impact competition in the markets, they need to be nipped, and the CCI, till now, has no explicit legislative powers to do such a thing. The reasoning in *XYZ* is not on a sound legal footing.

If timely amendment processes were initiated and yearly reviews of the legislation were undertaken, then, the Commission would not have had to resort to specious reasoning to arrogate to itself jurisdiction which it does not possess, as it has done in the *XYZ* case.

It is hoped in earnest that the Draft Bill, as far as it addresses the "buyer's cartels" becomes the law of the land. The CCI cannot have a type of cartel, which might also adversely affect competition, outside the scope of its power. A welcome step in the right direction, albeit very late.

In absence of such an amendment, imagine a scenario where one buyer is a customer for 40 percent of a particular product's production. If such a buyer would bring down his demand to 10 percent there would be a demand-supply mismatch, and the prices would fall. If such a buyer, got together with another buyer, who has 20 percent of the demand for the same product, then together, they would be able to account for 60 percent of the purchases and would be in a position to lobby together for beneficial pricing, perhaps even to the detriment of the remaining 40 percent of the buying market. In such a hypothetical, the CCI would have no powers till the amendment process is completed (unless they resort to superficial reasoning as they did in the case of *XYZ*).

Further, it is also suggested that the CCI should undertake a periodic review of the legislation, to address the lacunae in implementation. This review definitely should not be a once in 10-year review as it has turned out to be. The constitution of the CLRC, then its deliberations before submitting the report, and the release of the Draft Bill for public comments has made the review process itself almost two years long. This delay is unacceptable. And, we are no closer to the amendment due to the fore-mentioned delays and the Coronavirus pandemic.

Finally, it would help if the CCI, as a regulator, follows the "*doctrine of precedent"* to ensure continuity in its reasoning and rationale for its decisions. With no reference to the only other buyer's cartel case decided by it – 'Pandrol', the CCI in the 'XYZ' order makes one believe that ad-hoc adjudications are being made, which leads to uncertainty in the regulatory process. Even if the reasoning in an old order does not appear sound to the bench deciding a matter at hand, it should be specifically overruled, so as to not lead to a scenario in which we stand today – two divergent decisions regarding the same subject matter.