

Buyer's Cartels Have Now Taken The Driver's Seat In India
written by Priyanka Barik | April 1, 2020



The Emergence of Buyer's Cartel from Competition Law Bill 2020

The much-awaited Competition Law

Amendment Bill 2020[1] ("the

Bill") was drafted and put up for public comments on February 22, 2020. The bill discusses a few key points that were earlier overlooked by the legislators

while framing the amended Competition Act, 2002 ("the Act"). In the Bill, they have mentioned about recognizing the buyer's cartel formation. The Bill modifies and amends the definition of 'trade' as the buyer's perspective has

been included in it. Buyer's participation in forming such an arrangement can have an adverse effect on the competition. A bare reading of the Bill reveals that it seeks much more clarity and transparency in the competition regime.

RECOGNITION OF BUYER'S CARTEL

The Bill broadens the horizon of the definition of 'cartels' to include the practice of Buyer's cartel. It comprises such players who influence the price associated with their purchases and try to eliminate competition from the market by getting into such collusions or by controlling the behaviour of the producers in the market. Such arrangements by buyers might lead to predatory buying, where they purchase certain products at a specific rate from a particular seller in order to flush out other competitors. Therefore, such collusive arrangements have an appreciable adverse effect over the competition in the market making these types of arrangements as anti-competitive.

The mere formation of the buyer's group in the competition arena is different from the buyer's cartel and are prima facie not considered as illegal. There is a thin line difference between a buyer's group and a buyer's cartel. Buyers' group basically uses the combined buying power to obtain volume or desired discounts on goods and services for the purchase, use or resale whereas the only objective of the formation of a cartel is to create, allocate, associate and exploit the buyer's power to influence the market forces and hence affect the competition.

However, on a careful perusal of the current definition of cartel given in the Act which includes, producers, distributors, traders, or service providers, the Indian Courts find it difficult to interpret "buyers" in the same footing.

However, after the introduction and substantive expansion of the Competition Law, there have been growing awareness over the exploitation of buyer's power, which has raised few eyeballs over the effective functioning of the in

Indian markets. The Act was primarily introduced in order to provide a better mechanism to deal with the ever-increasing issues of anti-competitive practices. However, the Monopolies and Restrictive Trade Policies Act, 1969, ("MRTP Act") was amended and substituted because it became redundant with time and had a lot of loopholes where it provided various escape routes to the enterprises to hinder the market forces.

However, there was no significant attention given to the concept of buyer's cartel and their implications over the competition in the new amended act. The buyer's side of the market received less focus from the legislature; rather the arrangements for any anti-competitive practices are more seller-centric. Hence, it becomes really important for the legislature to recognize such arrangements and bring in provisions that will provide a robust mechanism in order to prohibit such cartels affecting the competition in the market.

TRACING THE

EVOLUTION OF INDIAN POSITION CONCERNING BUYER'S CARTEL

When we read the provision

related to Cartels in the Act, the intention of the legislature could be inferred

that it has completely focused on "Seller- oriented cartels" and avoided the prospect of buyers forming a cartel. The Act defines a cartel as 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. This definition limits its scope to other emerging possibility of a cartel being formed by buyers.

There are various avenues where the Competition Commission of India ("CCI") recognizes and punishes sellers for forcing cartels as it impacts the competition adversely. However, they overlooked the part where buyers can also form a cartel. Further, in case of *Pandrol Rahee Technology Pvt. Ltd. vs. Delhi Metro Rail Corporation and Others*[2] , the CCI dealt with the anti-competitive practices allegedly undertaken by the respondents in the purchasing process of Metro Rail Fastening System wherein they collectively selected only one proprietary system over the others, thus, eliminating the competition in the market.

The CCI observed that the aspect of the buyer will not come under the definition of "Trade" in Section 2(x) of the Act which deals with production, supply, distribution, storage or control of goods. However, the courts in the US recognizes buyer's cartel as anti-competitive in nature. Hence, it is illegal to get into any such arrangements, where as in India the current law has limited the court to interpret the provision in such a manner that can fit well to the concept of buyer's cartel but it is not expressly covered in the provisions. Hence, the proposal of amending the current law makes it more specific in nature.

CONCEPT OF

HUBS AND SPOKES

According to Section 3(3) of the Act, the horizontal arrangements, including cartels are presumed to be anti-competitive in nature because they have a substantive Appreciable Adverse Effect on the Competition ("AAEC") unless

rebutted otherwise. The committee recognized that there exist certain other forms of arrangements as well which might have an AAEC in the market. Such arrangements may have a third party, known as 'Hub', which facilitates collusion between two or more competitors called 'Spokes'.

In such a form of arrangements, the Hub interacts with one or more Spokes and shares relevant information with them. Spokes then comes into an arrangement or an agreement based on such information, which can affect the competition in the market adversely and can come under the purview of formation of cartels under the analysis of anti-competitive agreements, but the hubs may escape the liability under the contours of Section 3(3) of the Act.

In a recent judgment^[3], the CCI elaborated on the existence of such arrangements in the market and their adverse effect over the competition. It was discussed that the spokes must use a third-party platform to exchange sensitive information, including information on prices that can facilitate price-fixing.

There needs to be a conspiracy to fix prices, which requires the existence of such collusion. The committee, therefore, suggested that there should be an express provision to clarify the scope and extent of Section 3(3) of the Act. They recommended the addition of an explanation to Section 3(3) of the Act to include the definition of 'Hubs' and impose liabilities on such arrangements.

CONCLUSION

The existence and exploitation of buyer power is an important concern in the competition regime. There has always been speculation regarding the buyers forming such cartels which will pose a threat to the existing competitive market. Now it's time to bring such collusions in the limelight as it would have sufficient power to compel the seller to reduce prices and increase output.

Therefore, it is of utmost importance to regulate such arrangements through amending the existing provision and including the term 'Buyer' in the definition of 'cartel' in Section 2(c) of the Act. The objective was also to regulate certain anti-competitive formation like the concept of Hubs and Spokes. The proposed amendment will help the court get a clearer perspective over the agreements and arrangements affecting the vital factors in the market and primarily to effectively promote healthy competition within the country.

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- ^[1] <http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>
 - ^[2] CCI order dated 07.10.2011 in Case No. 3 of 2010.
 - ^[3] CCI order dated 06.11.2018 in Case No. 37 of 2018

Contributed By - Priyanka Barik

Designation - Associate

King Stubb & Kasiva,

Advocates & Attorneys

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New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi

Tel: +91 11 41032969 | Email: info@ksandk.com