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## **Global Forum on Competition**

### **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

#### **Contribution from India**

-- Session IV --

*This contribution is submitted by India under Session IV of the Global Forum on Competition to be held on 29-30 October 2015.*

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## **SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION<sup>1</sup>**

**-- India --**

### **1. Introduction**

1. Collusion is an egregious anticompetitive market conduct. Competing firms adopt collusive conduct or behaviour to avoid competitive pressure and to increase profit. Such collusion is usually observed in price fixation, bid rigging, market division and output reduction. They collude to increase prices above competitive levels by way of horizontal agreements among themselves or vertical agreements with retailers to keep prices high. They also collude to reduce output or share the market. Moreover, competitive firms collude for winning bids of procurement. Bid rigging enables them to avoid price competition and rewards collusive firms by way of high bid prices. It vitiates the price discovery process.

2. Collusion may be in many forms; explicit (overt), implicit (tacit) or a combination of the both. It is prohibited across the world as it harms consumers by increasing the price or reducing the quality of product or limiting choices for goods or services.

### **2. Which industries are prone to collude?**

3. The possibility of cartelisation is high in oligopolistic markets. By colluding, oligopolistic firms increase their market power and behave like a monopolist. Their coordinated behaviour regarding the output and price determination generates a larger collusive profit, which is shared by the cartel members. Such profit is increased at the cost of consumer welfare.

4. Normally, collusion arises in two situations; (i) when an industry has few firms and each firm has a significant market share and (ii) in an industry or market in which a few firms hold most of the market share and a large number of firms hold insignificant market share.

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<sup>1</sup> This contribution is submitted by India under Session IV of the Global Forum on Competition (GFC) of OECD scheduled to be held on Friday, October 30, 2015.

### 3. Factors that facilitate collusion

5. A serial offender is an industry or firm which repeats the violation of competition law intentionally and frequently. Such endemic collusion is normally observed in those industries wherein, inter alia, following characteristics are observed:

- i) The possibility of endemic collusion is more in oligopolistic industries or markets.
- ii) High entry barriers protect the profitability of existing firms in an industry derived out of collusion.
- iii) Product homogeneity increases the possibility and sustainability of endemic collusion as it facilitates easy monitoring of collusive behaviour. Collusion is more difficult in industries wherein competing firms produce differentiated products and have the capacity to increase market share by cutting the price.
- iv) Risk perception also motivates competing firms to collude. Where individual firms feel they have similar high risks that can be reduced by collective action, they tend to take coordinated action.
- v) Low price elasticity of demand also provides incentive for collusion. The lesser the price elasticity of demand for a product, the greater the potential gains from collusion. In case of high price elasticity, collusion becomes unattractive as a small increase in the price would result in a sharp contraction in total revenue.
- vi) Endemic collusion is found in those industries which use mature technology. Collusion is more difficult in the innovative markets where one firm may gain significant advantage over its rivals through innovation.
- vii) It has also been observed in India that endemic collusion is prevalent in those industries wherein trade associations are active, e.g., film industry, pharmaceuticals, etc. In many cases it was found that trade associations act as a platform for coordinating and managing cartel behaviour of firms in the industry.

### 4. Indian experience

6. Frequent competition law violations have so far been observed only in a few industries in India. Collusion in some form or the other, has been seen mostly in the sectors or industries like chemical, pharmaceuticals, cement, film & TV and tyre etc. However, cement, pharmaceutical and film industries require special mention because of the common factor of active involvement of industry associations and are briefly discussed below:

#### *Cement Industry*

7. The Cement industry is known to be prone to cartels worldwide. Globally, several cement cartels have been detected and punished. Like its foreign counterparts, CCI too has been receiving a number of complaints about the collusive behaviour among the major cement players in India.

8. The most common anticompetitive practices surfaced through cases in the industry is related to parallel and coordinated behaviour of cement companies on price, dispatch and supplies in the market. It was alleged that cement companies do not utilize the available capacity so as to reduce supply and raise prices in times of higher demand. They share the market by dividing the territory into zones so as to enable themselves to control the supply and determine or fix an exorbitantly high price of cement by forming a

cartel. The act of these cement companies in limiting and controlling supplies in the market and determining prices through an anticompetitive agreement is not only detrimental to the cause of the consumers, but also to the whole economy since cement is a crucial input in construction and infrastructure industry vital for economic development of the country.

9. It was observed that trade associations of the industry were very active and indulged in anticompetitive practices. Cement Manufacturers' Association was involved in increasing the price of cement by limiting and restricting the production and supply of cement as against the available capacity of production.

10. Based on the detailed investigation, CCI penalized cement manufacturers and also their association for violation of the provisions of the Competition Act, 2002. CCI also directed the cement manufacturers association to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on the production and dispatches of cement companies to its members.

11. Despite these orders and directions, anticompetitive cases in the sector are still being brought before the Commission. Given the frequency of complaints received by CCI in cement industry, CCI has been continuously keeping a vigil on the behaviour of cement companies to detect probable anticompetitive practices. *List of important cases may be seen in the Annexure.*

### ***Pharmaceutical Sector***

12. Frequent competition law offences have been observed in Indian Pharmaceutical Industry, particularly in distribution chain of pharmaceuticals. Trade associations of chemists and druggists have been found very actively engaged in facilitating anticompetitive practices in the industry. Anticompetitive practices in the industry surfaced through various cases (i) requirement of taking 'no objection certificate' by the manufacturer from trade association before appointing stockists or distributor since only members of the trade association could be appointed as stockists or distributors by the manufactures; (ii) manufacturers may appoint a specified number of wholesalers in an area, but the appointment of subsequent wholesalers is allowed only if the other wholesalers had met certain revenue targets set by the association; (iii) manufacturers may introduce a new drug in the market only after taking necessary approval from the association. Trade association gives such approval by receiving service charges of Product Information Service (PIS); (iv) trade margins are fixed by the associations and distributors/retailors not allowed to give discounts; (v) only authorized stockists are allowed to bid for supply of drugs to government and hospitals; and (vi) trade association imposes fines on manufacturers/distributors/stockists if they do not comply with the guidelines or directions of the association.

13. The Commission found in several cases that the above mentioned practices of the trade associations were anticompetitive in nature and imposed penalties on the concerned associations. In some of the cases, CCI has also imposed penalty on individual office bearers of the associations. Despite these orders, issues of anticompetitive practices in the sector are still being brought before the Commission.

14. One of the reasons for frequent cases in the pharmaceutical sector is the active role played by the trade associations of this industry. Trade associations act as a platform that overtly or covertly support anticompetitive behaviour. *List of important cases may be seen in the Annexure.*

### ***Film Industry***

15. Endemic collusion has also surfaced in film industry. Being a multilingual country, there are several regional markets for film and TV industry based on language in India. Accordingly, there are

various regional associations of film producers, distributors and exhibitors. In most of the cases related to film industries, one of the party happened to be the industry association.

16. Based on various cases, the most common anticompetitive practices observed in the film industry are: i) Prohibiting members from dealing with non-members; ii) Making registration of film with the trade association compulsory before release; iii) Boycotting a new film or dubbed film to release; iv) Observance of hold `back period for exploitation of films through other media e.g. satellite right, home video right etc; and v) Imposing unfair terms and conditions on revenue sharing.

17. These collusive practices prevent the competing parties from pursuing their commercial activities which result in competition distortion and denial of consumer choice. There is no doubt that such conduct leads to anticompetitive outcomes. Therefore, the CCI has penalized a number of film associations for such anticompetitive practices in various cases. However, cases related to film industry are still being brought before the Commission.

18. Like pharmaceutical industry, trade associations of film or TV serial producers, distributors and exhibitors are also active and indulge in anticompetitive practices. As per the practice prevalent in the film-industry a distributor is normally required to become a member and /or register a film through the distributors' association for the territory in which the distributor is carrying on business. A distributor is allowed to book theatres for releasing a new film only after registration.

19. Trade association imposes fine or suspends the membership of a distributor who does not follow their guidelines and direction. So the cinema exhibitors are unwilling to take the risk of exhibiting the film of a distributor who is not a member of the association or whose film is not registered with the association. *List of important cases may be seen in the Annexure.*

## **5. Conclusion**

20. Certainly, there are industries which are repeat offenders in terms of violation of competition laws, including frequent collusive behaviour. Economic literatures provides a number of factors that are conducive to collusion. However, Indian experience shows that one of the most prominent factor is the presence of active trade/industry associations which provides a platform to competitors to interact frequently, facilitates exchange of price sensitive information and sets a standard practice in the industry in a collusive manner. They act as a vehicle of facilitating cartel in the name of protecting interest of members. This indicates the need to be more vigilant of the activities of trade/industry associations as well as take appropriate advocacy measures.

**ANNEXURE**

***Cement Industry***

1. Case No. 29 of 2010 (Builders Association of India vs Cement Manufacturers' Association and others)  
<http://www.cci.gov.in/May2011/OrderOfCommission/292011.pdf>
2. Case No. RTPE-52/2006 (In re: Alleged Cartelization by Cement Manufacturers.)  
<http://www.cci.gov.in/May2011/OrderOfCommission/522006.pdf>

***Pharmaceutical Industry***

1. Case No. 78 of 2012 {M/s Rohit Medical Store vs Macleods Pharmaceutical Limited & Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/78201227.pdf>
2. Suo moto Case No. 05/2013 {Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/052013.pdf>
3. Case No. Suo moto Case No. 02 of 2012 {In Re: Bengal Chemist and Druggist Association} and Ref. Case No. 01 of 2013 filed under section 19(1)(b) of the Competition Act, 2002 by Dr. Chintamani Ghosh, Director, Directorate of Drugs.  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/022012.pdf>
4. Case No. 60/2012 {M/s Arora Medical Hall, Ferozepur vs Chemists & Druggists Association, Ferozepur & Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/602012.pdf>
5. Case No. 30/2011 {M/s Peeveear Medical Agencies, Kerala vs All India Organization of Chemists and Druggists and Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/302011.pdf>
6. Case No. 41/2011 {M/s Sandhya Drug Agency vs Assam Drug Dealers Association and Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/412011.pdf>
7. Case No. 20/2011 {M/s Santuka Associates Pvt. Ltd. vs All India Organization of Chemists and Druggists and Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/202011.pdf>
8. Case No. C-87/2009/DGIR {Vedant Bio Sciences vs Chemists & Druggists Association of Baroda. }  
<http://www.cci.gov.in/May2011/OrderOfCommission/c872009.pdf>
9. Case no. MRTP C-127/2009/DGIR4/28 {Varca Druggist & Chemist & Ors. vs Chemists and Druggists Association, Goa }  
<http://www.cci.gov.in/May2011/OrderOfCommission/4-28%20Main%20Order.pdf>

***Film Industry***

1. Case No. 58/2012 {Kannada Grahakara Koota Shri Ganesh Chetan vs Karnataka Film Chamber of Commerce (KFCC) & others.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/582012.pdf>
2. Case No. 45/2012 {Kerala Cine Exhibitors Association vs Kerala Film Exhibitors Federation and Others}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/06201245.pdf>
3. Case No. 32/2013 {Shri P.V. Basheer Ahamed vs M/s Film Distributors Association, Kerala}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/322013.pdf>
4. Case No. 62/2012 {M/s Cinemax India Limited (now known as M/s PVR Ltd.) vs M/s Film Distributors Association (Kerala)}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/622012.pdf>
5. Case No. 78/2011 {M/s Reliance Big Entertainment Private Limited vs Tamil Nadu Film Exhibitors Association.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/27/782011.pdf>
6. Case No. 71/2011 {M/s Shri Ashtavinayak Cine Vision Limited vs PVR Picture Limited, New Delhi & Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/712011.pdf>
7. Case No. 56/2011 {M/s Cinergy Independent Film Services Pvt. Ltd vs Telangana Telugu Film Distribution Association & Ors. 8. Case No.01/2009}  
<http://www.cci.gov.in/May2011/OrderOfCommission/562011.pdf>
8. Case No.01/2009 FICCI – {Multiplex Association of India vs United Producers/ Distributors Forum & Ors.}  
<http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf>