

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Purchasing Power and Buyers' Cartels – Note by India

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<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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1. Introduction

1. The Indian Competition Act 2002 (Act) is the legislation regulating anti-competitive conduct in India, and the Competition Commission of India (CCI) is the statutory authority, established under the Act, overseeing the enforcement of the competition law, its duties involve the achievement of the objectives of the Competition Act, namely the prevention of practices causing an appreciable adverse effect on competition (AAEC), the promotion of competition in the market, and the protection of the freedom of trade and the interests of the consumer. CCI is aided in its duties by its investigative arm, the Office of the Director-General (DG).

2. Cartel under the Indian law

2. In general terms, a cartel is a group of competitors who have agreed to limit or eliminate competition in some economically relevant dimension.

3. Under the Indian legislation, Section 2, sub-section (c) of the Act defines the term 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.”*

4. The Act, as such, does not explicitly recognise cartel from buyer’s perspective as may be deduced from the following terms:

- The definition of cartel as provided under Section 2 (c) of the Act does not include the term buyers.
- The definition of the term “trade” as provided under Section 2(x) of the Act includes only production, supply, distribution, control, or storage of commodities with no specific mention of the terms such as” acquisition/procurement of goods/services.”

5. Thus, upon a literal interpretation of these definitions, the scope of inquiry granted by the Act under Section 3, as such, involves only seller’s-oriented cartels, without directly or indirectly referring to buyer’s cartel.

6. Section 3(1) read with Section 3(3) and 3(4) of the Act categorically proscribe certain anti-competitive agreements viz. agreements between or among competitors (horizontal agreements, like those of cartels) and agreements between competitors at different levels of the production chain (vertical agreements). Horizontal agreements and practices in the nature of bid-rigging, price-fixing, etc., if established, are presumptively deemed to have appreciable adverse effect on competition (AAEC), and are void under Section 3(1) of the Act unless the agreement is anchored to an efficiency-enhancing joint venture. Based on facts and evidence, it may be established that the competitors had entered into an agreement with the object of fixing prices, limiting supply, sharing markets or rigging bids. While this presumption is rebuttable, alleged cartelists have seldom succeeded in opposing the same. For assessment of the anti-competitive effects of a cartel in case of rebuttal, CCI evaluate AAEC taking into account different factors as provided under Section 19(3). Sub-section (a) to (c) of Section 19(3) constitute negative factors while sub-section (d) to (f) constitute positive factors of consumer welfare. The said factors are:

(a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. CCI's investigative arm, the office of the Director General, is vested with the power to search and seize documents, and to collect evidence, be it direct or circumstantial, *via* raids to establish the existence of a cartel agreement.

3. Buyer's cartel

7. Buyers may enter into collaborative arrangements to form cartels that can force down the prices of common inputs below the prices that would have reigned in a more competitive procurement market. Powerful buyers can enter into arrangements to undercharge their input suppliers. There are many factors that may accentuate propensity of buyers' cartel, such as opportunities for intra-buyer communications, homogenous products, inelastic demand, geographic isolation, etc.

8. A 'buyer's cartel is a group of purchasers who mutually agree to remove competition from the relevant market by fixing prices for procurement or to otherwise influence the behavior of a supplier. Such agreements could occur amongst buyers either at the end-consumer stage or at any other level of production. Such a collaboration amongst buyers could eventually reduce the overall market production. The downstream market might be affected by a major drop in output by lowering the volume of production generated and higher pricing for the rest of the production.

4. Buyer's cartel in international jurisdictions

9. In theory, buyer's cartels are established for the sole purpose of allocating, associating, and using buyers' powers to control and influence market competition, mainly by overpowering sellers. In the United States, however, Courts recognise buyer's cartels to be anti-competitive, and it is illegal to enter into such agreements. USA distinguishes cartel from purchasing joint ventures or buyer's groups and defines any cartel with anti-competitive effect *per se* illegal as per the Sherman Act, however, it exempts a buyer's group from its purview. A buyer's group is a congregation of buyers to enhance bargaining powers of the consumers to reduce their transaction costs without harming competition. Since the US Supreme Court's decision in *Mandeville Island Farms v. American Crystal Sugar*¹, the US courts have treated buyers' cartels as *per se* illegal under the Sherman Act. Predatory bidding is also specifically prohibited. US law allows certain exemptions to buyer groups such as farm and fishing cooperatives, permitting them to engage in collective bargaining on an industry-wide basis.

10. Article 101(1)(a) of the Treaty on the Functioning of the European Union expressly prohibits agreements that directly or indirectly fix purchase prices, thereby preventing, restricting or distorting competition. In *Raw Tobacco Italy*², the European Commission condemned purchasing cartels as detrimental to consumer welfare. In *BNIC v. Clair*³, the

¹ 334 U.S. 219 (1948)

² Case COMP/C.38.281/B.2

³ Case 123/83, ECLI identifier: ECLI:EU:C:1985:33

European Court of Justice held that it is unnecessary to take into account actual effects of an agreement fixing a minimum purchase price, as its natural object is to restrict, prevent or distort competition. EU Law also holds a buyer liable for abuse of dominant position.

11. It has been seen, in jurisprudence as developed in foreign jurisdictions, that buyer power arises from much smaller market shares than is usually associated with seller power. Important buyers can exercise significant power even if they do not buy very large shares of the inputs involved for instance in the case of Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000), it was held that market share of about 20 percent of all toys sold in the United States conferred sufficient power to impose anticompetitive restraints on suppliers.

12. In another case Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 & n.7 (1959) it was held that even where no market shares were given, the defendant, a large department store chain, one of many retailers of appliances in California, still had sufficient buyer power to induce suppliers to collude to exclude a competitor of the large buyer.

13. However, it would not be inappropriate to suggest that some buying power is not necessarily undesirable from the perspective of maintaining a competitive markets system.

5. Buyer's cartel v. Buyer's groups

14. Buyers may use their power to regulate aspects of competition in the downstream markets because input costs are often a significant factor in the pricing of downstream products, as for instance if buyers cause a sufficient reduction in output, this can affect a downstream market by increasing scarcity of the product made with that input, resulting in higher prices for the remaining production. Moreover, a buying group may provide a means to coordinate such prices creating a culture of price stability and avoidance of competition.

15. Buyers' Cartels is different from Buyers' Groups as Buyers' groups are those that integrate their purchasing activity for market benefits. Like buyers' cartels, these groups act in concert, but the objective of a buyers' group is to avail the benefits of a joint enterprise such as reduced transaction costs, per unit costs, protection against defective products, and the like. On the other hand, buyers' cartels only coordinate their purchases to overpower sellers, restricting competition. Demarcating the two often becomes an intractable task, thereby necessitating a case-by-case approach. Buyers' cartels deprive sellers of the rewards they could receive in a competitive market, thereby defeating the very purpose of competition law. At times when the buyers constitute a substantial part of the resale market as well, the buyers' cartel may even morph into a sellers' cartel on the selling side of the market.

16. Thus, in the market arena, the buyers' group is distinct from the buyer's cartel and is *prima facie* not illegal. The buyers' group uses a combined purchasing power in theory, in order to gain volume or desired discounts in purchasing, using or reselling goods/services, while the only objective of a buyers' cartel is the establishment, allocation, association and utilisation of buyer's power for the purpose of controlling and influencing competition in the market, especially by overpowering the sellers.

6. Buyer's cartel in India

17. In India, there are no express legal provisions in this matter. Although the Act does not include the term "buyer", it has been reasonably interpreted that the legislative goal is to include buyer's cartels; the prohibition of anti-competitive agreements is broad enough to extend to buyer's cartels as well.

18. The actual loss to society on account of buyers' cartel cannot be easily determined because there is no clear loss to end consumers in this case, as is often the case in sellers' cartel. Buyer's cartels have the effect of reducing prices to the end consumer, accruing direct benefits to consumers. Therefore, it may usually satisfy some of the positive factors under Section 19(3) of the Act, making the analysis difficult for CCI. A buyer's cartel can prevent the consumers from excessive charges by sellers. Even though they may temporarily drive sellers out of market, they may not even possess enough requisite market power to substantially affect the competitive interests of sellers.

7. Decisional practices of CCI in relation to Buyer's cartel

19. In the case of *India Glycols Ltd. v. Indian Sugar Mills Association & Others*⁴, it was argued before the CCI that the joint tendering by the concerned oil marketing companies and the alleged agreement among them to procure ethanol at a fixed price were anti-competitive in nature and amounted to violation of Section 3 of the Competition Act, 2002. However, this argument was rejected on the ground that the decision to fix the price was taken by the Cabinet Committee of Economic Affairs, Government of India.

20. The question of inclusion of buyer's cartel came for adjudication in the case of *Pandrol Rahee Technologies v. DMRC Ltd.*⁵, wherein, the Informant alleged anti-competitive conduct, by virtue of agreements and abuse of dominance, by 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. 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. CCI observed that Section 3(3) dealing with cartels refers to agreements between persons "engaged in identical or similar trade" and consumers could not be covered here. It was argued that DMRC had colluded with other Metro Rail Corporations for purchase of rail fastening systems.

21. The Commission, thus observed that Section 3(3) concerns agreements between persons, etc engaged in identical or similar trade.

22. The term "trade" has been defined under Section 2(x) of the Act as "any trade, business industry, profession, or occupation relating to the production, supply, distribution, storage or control of goods and includes provision of any services".

23. The term, "acquisition" mentioned in the definition of enterprise under Section 2(h) of the Act is not included here. As can be seen, purchasing activity of a consumer does not

⁴ Case Nos. 21, 29, 36, 47, 48 & 49 of 2013, Order under Section 27 of the Act dated 18.09.2018

⁵ Case No. 3 of 2010, Order under Section 26(2) of the Act dated 07.10.2011

qualify as “trade”, accordingly, the Commission held that Section 3(3) is not applicable to a consumer.

24. Further, on the issue of buyer’s cartel, in the case of **XYZ Corporation v. Indian Oil**⁶, wherein an existence of a buyers’ cartel was alleged, the Commission opined that Section 3(1) and Section 3(3) (a) cover both sellers’ as well as buyers’ cartel, as is apparent from the following provisions

25. Section 3(1): No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

26. Section 3(3)(a): directly or indirectly determines purchase or sale prices.

27. Further, the Commission observed that though the Act covers buyers’ cartel within the purview of Section 3(1) read with Section 3(3) of the Act, treating buyers’ arrangement/cartel at par with sellers’ cartel may not be appropriate. For assessment of such cases, it is imperative to first, look at the potential theories of harm and then the conditions necessary for infliction of competitive harm need to be examined.

8. Recommendations of Competition Law Review Committee Report concerning buyer’s cartel

28. Based on the enforcement experience gained over the last decade, certain issues had come to the forefront, markets had seen the growth of newer and disruptive models of businesses and practices that were not adequately covered by the current regulatory framework. Hence in order to draw from past experience and to prepare for future challenges in the enforcement of competition law framework in India, the Competition Law Review Committee (the Committee) was constituted by the Ministry of Corporate Affairs, government of India. It was tasked with the responsibility to review and recommend a robust competition regime, by taking the inputs of key stakeholders, and suggest changes in both the substantive and procedural aspects of the law. The Report of the Committee in July, 2019, amongst other suggestions, stated that Section 2(c) of the Act defines a ‘cartel’ to include an association of producers, sellers, distributors or service providers, but makes no reference to buyers. The absence of the term ‘buyers’ in the existing definition of cartel means that the current definition does not expressly refer to the possibility of ‘buyers’ cartels. The Committee noted that the CCI has recognised buyers’ cartels in its decisional practice and has explicitly clarified that Sections 3(1) and 3(3) of the Act cover both sellers’ and buyers’ cartels.⁷ While the CCI has not faced any enforcement gap on account of the current definition of ‘cartel’, in order to make the definition more comprehensive and in line with the decisional practice of the CCI, the Committee considered whether the express recognition of buyers’ cartels by adding the term ‘buyer’ to the definition of cartel in the Competition Act was desirable. The recognition of the liability of buyers’ cartels also accords with the practice in the EU.⁸ Even in the US, courts have assessed the possibility

⁶ Case No. 5 of 2018, Order under Section 26(2) of the Act dated 04.07.2018

⁷ *Supra*

⁸ Case AT.40018 *Car battery recycling* [2017] C(2017) 900. As the EU’s fining regime is based only on the value of sales, which would not apply for a buyers’ cartel, the companies involved were fined on the value of the purchases, rather than the value of sales

of buyers' cartels and then subjected them to a *per se* approach,⁹ especially where they possess monopsony power.¹⁰

29. The Committee noted that the express inclusion of the term 'buyers' in the definition of cartel could help draw attention towards cartelisation practices on the buyers' side¹¹ and clarify that such buyers' cartels are within the ambit of the Competition Act. Consequently, it was also agreed to include the term 'buyers' in the proviso to Section 27(b), which deals with the imposition of penalty on the entities involved in a cartel and in Section 46 which deals with lesser penalty applications.

30. Accordingly, in line with the decisional practice of CCI, and in the interests of comprehensiveness, the Committee recommended to incorporate the word 'buyer' in the definition of 'cartel' in Section 2(c) of the Competition Act. Flowing from this, the Committee observed that the express recognition of buyers' cartel also necessitates amendment to the proviso to Section 27(b) and to Section 46.

9. Draft Competition Amendment Bill, 2020 (Amendment Bill)

31. The Competition (Amendment) Bill 2020, drafted according to the recommendations of the [Competition Law Review Committee Report 2019](#), proposes to make cartelisation by buyers a *per se* offence. As a result, the Draft Competition Amendment Bill, 2020 (Amendment Bill) included the concept of buyer's cartels under cartels in the Indian competition law. As a result of this proposed change, CCI will now have the power to evaluate anti-competitive agreements between buyers. The definition of a cartel as proposed to be amended by the Draft Bill, under Section 2(c) would be: "*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." However, unlike the US and the EU, the recognition does not extend to abuse of dominance by buyers.

10. Conclusion

32. Putting in a nutshell, buyer cartels generally rest on the notions of countervailing power, if a group of small buyers face a monopoly they individually are not forceful to bargain for better prices however if these individual buyers come together, they may effectively succeed in bringing down prices and increasing output however with increased power, buyers may impose onerous conditions on the sellers that may require restrictions on access to the inputs that foreclose competitors in the buying market or may use control of significant inputs to secure coordinated competition in the downstream market. Hence

⁹ Such anti-competitive conduct is assessed within the ambit of Section 1 of the Sherman Antitrust Act, 1890 which in broad terms declares agreements that unreasonably restrain trade to be illegal.

¹⁰ In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) in respect of a buyer cartel of sugar refiners that possessed monopsony power and were subject to *per se* treatment.

¹¹ CCI order dated 07.10.2011 in Case No 03 of 2010. This case saw allegations of anti-competitive practices against the buyers of rail fastening systems, but the CCI did not make any finding of infringement, one of the reasons being the lack of any express reference to the purchasing activity of a consumer in the Competition Act.

competition authorities must look broadly at the parallel buying practices especially in markets with relatively few buyers and many sellers.