

Unclassified

DAF/COMP/GF/WD(2012)52

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

10-Feb-2012

English - Or. English

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

Cancels & replaces the same document of 08 February 2012

**Global Forum on Competition**

**IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS**

**Contribution from India**

-- Session II --

*This contribution is submitted by India under Session II of the Global Forum on Competition to be held on 16 and 17 February 2012.*

**JT03315853**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/GF/WD(2012)52  
Unclassified

English - Or. English

## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- India --

### 1. Introduction

1. In the context of globalization, economies are moving ever closer together and becoming more interdependent. Business is expanding itself from national boundaries and is obtaining a transnational character. Globalization has increased reach of the anti-competitive practices including cartels indulged in by the enterprises. The pernicious effects of a cartel are further compounded when such arrangements are amongst undertakings with business operations across countries. Although only in recent years, the extent of harm caused by international cartels has been documented, international cartels are by no means a recent phenomenon or a by-product of liberalisation, as their cross border dimensions would seem to suggest. Liberalisation, however, may indeed have facilitated the success of cartels owing to markets opening up across the world, making it possible to engage in transnational anti-competitive practices on a much larger scale than before, and garner larger profits thereby.

2. Economic globalization and the spread of **antitrust** laws worldwide are creating a unique set of challenges for competition authorities. It can be said that competition law is national, while markets are increasingly global. In recent years, antitrust enforcers have come to realise that the increasingly transnational character of competition cases clashes with the traditionally territorial scope of domestic antitrust rules. The key question is how can competition authorities manage marketplace conduct that takes place in one nation, but has a harmful effect in another? In practical terms, this means that competition authorities worldwide have to find ways to overcome the jurisdictional barriers inherent in the territorial nature of antitrust enforcement jurisdiction. It is understood that due to increasing geographical reach of business transactions and the international impact of anticompetitive activities in modern globalized markets, cooperation in enforcement is vital. Given the increasingly international nature of cartels, crossing the boundaries of jurisdictions, international co-operation in cartel cases is growing in importance. Such co-operation can involve for instance, coordination of simultaneous searches, raids or inspections, exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency.

3. The Indian competition law in its current form is of recent origin. While the Indian Competition Act ('the Competition Act') was enacted in the year 2002, the provisions thereof were notified in phases from May, 2009 to June, 2011. Thus, the enforcement experience of the anti-trust watchdog of India is of a limited period. The provisions governing anti-competitive agreements including cartels were amongst the first to be notified. However, the Competition Commission of India ('the CCI') is yet to receive and deal with a matter involving an international cartel. Further, till date there has been no instance of a request for cooperation to CCI from another competition agency in relation to an investigation into an international cartel.

4. This paper seeks to highlight the legal and policy framework in India for investigation and penalising cartels as well as facilitating international cooperation in investigation of cartels with foreign competition agencies. The paper examines the CCI's approach to international cooperation in investigations. The paper also provides brief account of CCI's limited experience of international

cooperation so far which has essentially focused on capacity building in all areas including cartels investigations taking into account experience and best practices followed by other jurisdictions.

## 2. Provisions regarding Cartels in Indian Competition Law

5. It may be useful at this stage to note some salient features of the provisions relating to cartels in the Indian competition law:

- Any agreement entered into between enterprises engaged in identical or similar trade of goods or provision of services, *including cartels*<sup>1</sup>, is presumed to have adverse effect on competition if it *inter alia* directly or indirectly determines purchase or sales prices; limits or controls production, supply, markets, technical development, investment or provision of services; shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.
- Unlike several other jurisdictions, cartel cases do not entail a criminal enforcement regime in India. However, CCI may *inter alia* pass cease and desist orders and impose penalty on the cartel members. The Act empowers the Commission, in case of cartel, to impose upon each producer, seller, distributor, trader or service provider involved in cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher. It may be noted that the Competition Act provides for a higher penalty in cartel cases.
- The Competition Act also empowers CCI to grant leniency by levying a lesser penalty on a member of the cartel who makes a full and true disclosure in respect of the alleged cartel.<sup>2</sup> The scheme does not provide blanket immunity and does come with certain riders.
- The Competition Act also empowers CCI to look into anti-competitive practices including cartel related activities taking place outside India and having effect on competition in India ( extra-territorial jurisdiction).

## 3. International Cooperation Strategy of CCI

6. CCI recognizes the importance of international cooperation for young competition authorities, who benefit from exposure to best practices from other jurisdictions as well as technical cooperation, capacity-building support and knowledge sharing. Therefore, CCI is developing a comprehensive international cooperation strategy, nuts and bolts of which will be cooperation and partnerships with competition jurisdictions (as well as relevant multilateral organizations) for mutual benefit. Cooperation with other competition agencies should be a win-win situation for both the partners in terms of technical cooperation and more effective/efficient enforcement of competition law including exercise of extraterritorial jurisdiction. There would be indirect benefits as well in terms of fair treatment of domestic companies in outside markets, and the creation of a level playing field between domestic companies and foreign competitors. At the same time, it is realized that cooperation with multilateral organizations like ICN, OECD and UNCTAD, which bring together competition experts from all over the world and provide

---

<sup>1</sup> Under section 2 (c) of the Indian Competition Act 2002 (the Act), the term “cartel” is defined as including “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”.

<sup>2</sup> Section 46 of the Competition Act, 2002.

rich insights into various competition issues, is equally vital. Therefore, CCI is taking a pro-active approach in interactions with these organizations also.

7. Co-operation in cartel investigations may involve exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency as well as coordination of simultaneous searches, raids or inspections. This requires mutual understanding and trust building between agencies through formal or informal mechanisms before such cooperation initiatives can take place. Therefore, soft cooperation in the form of technical cooperation and experience sharing and consequent understanding between the agencies can be the precursor to developing international cooperation in enforcement including cartels investigations. In view of this, CCI welcomes and is open to enhanced cooperation with other jurisdictions including cooperation in competition law enforcement.

#### **4. Experience of International cooperation**

8. As mentioned earlier, CCI is yet to receive a cartel case which involves cross-border ramifications. However, recognising that co-operation between competition agencies would be essential not only in dealing with international cartels but also cross-border mergers/ acquisitions and abuse of dominance by corporations dominant outside India, efforts to developing formal as well as informal relationships with foreign agencies are already underway. CCI has initiated relationship building with some of the foreign jurisdictions regarding possible arrangements and agreements that may be put in place for this purpose.

##### **4.1 Capacity building and technical cooperation**

9. Each jurisdiction has the responsibility to built capacity in order to investigate competition violations including for putting an end to hard core cartels. CCI's focus in international cooperation in the initial years has been on capacity building, technical cooperation and experience sharing with a view to developing India's competition law regime.

##### **4.2 Technical Cooperation with multilateral institutions**

10. Over the last three years, CCI has immensely benefitted from its interactions with OECD. India has been regularly invited to the meetings of OECD Competition Committee as well as OECD Global Competition Forum. Apart from this, OECD has been CCI's major supporter in the area of capacity building activities. CCI has received technical assistance support for organizing several events in CCI, which were tailored as per CCI's specific needs. Funded participation in various competition related events organized by OECD at its Regional Centre in Seoul provides CCI officers excellent opportunity to get exposed to latest thoughts and practices on various areas of competition regulation. Apart from OECD, CCI is also regularly participating in events of UNCTAD and ICN, other two important multilateral organizations involved in competition regulation issues. CCI has recently become member of Research Partnership Platform of UNCATD and its engagement with UNCTAD is expected to intensify. CCI is also member of some of the Working Groups of ICN and participates actively in them.

##### **4.3 Technical Cooperation with mature jurisdictions**

11. CCI has benefited from technical cooperation with the United States Federal Trade Commission and the EC's Directorate General for Competition (DG Comp). CCI officers visited DG Comp and gained valuable insights in cartel investigations, which proved instrumental in building up knowledge as well as confidence of CCI officers. CCI has also benefited from several workshops arranged by DG Comp and USFTC in CCI. CCI intends to develop several advanced capacity building programmes with both the jurisdictions over next few years to benefit from their long experience in competition law regulation.

#### 4.4 *Informal cooperation*

12. As mutual understanding amongst the coordinating agencies is a *sine qua non* for an effective and lasting cooperative relationship especially in cartel investigations, CCI is working on developing a comprehensive international cooperation framework by engaging with other competition agencies. While formal instruments for cooperation are important, the informal exchanges with other competition authorities help provide invaluable insights into their experiences helping CCI in building capacity and facilitating enforcement of domestic law effectively. Accordingly, CCI has been developing informal cooperation with foreign jurisdictions, on an ongoing basis to discuss issues of common concern and relevance through various forums. However, such interactions, so far, have not been in relation to any pending investigation or inquiry and the same primarily relate to capacity building and exchange of experience.

#### 4.5 *Formal cooperation*

13. For the purpose of discharging the duties and performing functions under the Competition Act, CCI may enter into any memorandum/ arrangement, with the prior approval of the Central Government, with any agency of any foreign country<sup>3</sup>. CCI is using MOUs as a formal framework to develop long term relationships with other agencies. For instance, recently CCI has signed MOU for cooperation with FAS, the Russian Federation. MOUs with some other agencies are also under active consideration. Apart from this, most of the India's multi-lateral and bilateral Free Trade Agreements already negotiated/under negotiations have a Competition Chapter, which provides for cooperation between competition agencies. These formal cooperation arrangements may facilitate development of cooperation in enforcement including cartel investigations involving exchange of information, coordinated investigations, etc.

### 5. **Information Sharing**

14. Cooperation may take place through formal as well as informal mechanisms. Any information shared by the CCI with agencies of foreign countries and the memorandums or arrangements in this regard have to conform to domestic laws of the respective parties. Even in informal cooperation involving information sharing, confidentiality and the sensitivity of the information are significant considerations. The CCI needs to account for the above factors both while responding to a request for material/ information from another agency as well as when seeking details in relation to investigations or otherwise from foreign agencies. Information sharing must be consistent with the laws of the land and in particular with the duty to maintain confidentiality as provided in the Competition Law. Many agencies use informal cooperation also to exchange information and share experiences in the fight against cartels. These mechanisms may produce good results and enhance cartel enforcement.

### 6. **International co-operation within other policy areas**

15. Apart from the framework provided for international co-operation in the Competition Act, the Government of India in its executive and sovereign powers also enters into various Mutual Legal Assistance Treaties (MLATs) / Bilateral and Multilateral agreements / Regional Trade Agreements (RTAs) etc. Besides, courts can send Letters Rogatory through diplomatic channels to seek information from other countries.

---

<sup>3</sup> Section 7 and section 18 of the Competition Act, 2002.

## **7. Challenges**

16. There may be many impediments in effective and efficient cooperation in the fight against international cartels. The differing legal regimes can be a challenge for international cooperation especially in the area of information sharing for specific cartel cases. The architecture of leniency regimes can have an effect on information sharing. Hence, alignment of leniency regimes coupled with the necessary waivers can facilitate international cooperation in the area of information sharing. In this regard, international forums like the OECD are ideal platforms to facilitate the alignment of leniency regimes. To facilitate cooperation with other agencies, the domestic legal and constitutional frameworks of the contracting parties need to be taken into account. It is also important to identify the potential for friction that may be caused due to the differences in the provisions or methods used by agencies in different countries.

## **8. Conclusion**

17. CCI fully recognizes the significance of international cooperation in cartel investigations and strives to build a robust information exchange network with other jurisdictions to facilitate seamless flow of information for effective enforcement of competition law provisions (including against cartels). To this end, CCI seeks to engage with developed and emerging jurisdictions to create a sustainable template that will supplement and complement the existing enforcement mechanisms of the coordinating agencies.

18. Technical cooperation and capacity building leading to mutual understanding may be the key building block in the international cooperation with foreign jurisdictions in investigations against international cartels. Cooperation mechanisms – both formal and informal have proven efficient in the fight against cartels. These mechanisms should be encouraged and promoted in all competition agencies including young jurisdictions in developing countries. Good practices in this area need to be spread largely by ICN, UNCTAD and OECD through various modalities.