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## Owing to coronavirus, CCI adopts “lenient” approach in admitted cartel cases

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*Competition authorities around the world have adopted measures to help businesses collaborate throughout the covid-19 pandemic, although they have warned against taking advantage of the health crisis. Khaitan & Co partner **Sagardeep Rathi** and senior associate **Radhika Seth** examine two recent decisions by the Competition Commission of India not to issue fines in admitted cartel cases, and what that means for cartel deterrence.*

Cartels are one of the most pernicious offences and deserve serious penalties for deterrence, the Competition Commission of India (CCI) has said in several decisions. Nevertheless, due to the economic troubles caused by the ongoing global pandemic, the CCI has taken a very “lenient view” and declined to issue fines in two recent orders involving entities engaged in cartels and bid rigging (some even admitted to their conduct). One case involved cartelisation in the market for industrial and automotive bearings ([Automotive Bearings case](#)) and the other involved bid rigging in tenders floated by the Indian Railways for the supply of composite brake blocks ([CBB case](#)).

While the reason for not imposing a penalty in *Automotive Bearings* is unclear due to the lack of any explanation given in the order, *CBB* is explicit about the reasons for not levying any monetary penalty. The CCI said the decision was made in the “interest of justice” due to covid-19, despite holding that cartelisation took place through clear admissions and documentary proof of the cartel.

The CCI considered the economic situation arising due to the outbreak of global pandemic and the support measures by the government of India for Micro Small and Medium Enterprises (MSMEs) as appropriate justifications for not imposing penalties.

An antitrust authority has a responsibility as a guardian of effective competition to have a regard for business realities and procompetitive considerations. In carrying out its duties during the “new normal”, the CCI has been working tirelessly holding virtual hearings and handing out approvals to mergers and acquisitions faster than ever. Not imposing fines is definitely a relief for those involved in the anticompetitive conduct during such times. However, given that the anticompetitive conduct existed long before the pandemic hit the world, we assess what this could mean for businesses and the CCI’s already established jurisprudence in the leniency regime.

### **Taking a step back**

Taking a step back, in both these cases the cartel arrangement existed and culminated in the pre-covid-19 period. In *Automotive Bearings*, the cartel took place between 2009 and 2011. One of the participants in June 2017 admitted to their participation in that cartel, which led to an inquiry. Another entity joined the proceedings during the investigation in September 2018. With the support of documentary evidence filed by two of the cartel participants, the CCI found that a cartel agreement existed, and passed its final order in June 2020 – almost a decade after the cartel took place.

In *CBB*, the cartel period identified was from 2009 to 2017. The investigation started in February of 2017, and the CCI’s final order was passed in July 2020. Evidently, harm to the market from the cartel was caused in the pre-covid-19 period, and any benefit to the parties from the conspiracy was reaped long before the pandemic shook India’s economy. Refuting the companies’ argument that the alleged conspiracy did not cause any appreciable adverse effect on competition (AAEC) in India due to lack of a price increase, the CCI held that even a likely AAEC is prohibited under the Competition Act. The *CBB* case confirms that an “agreement” between competitors to fix prices is sufficient to prove that it caused an AAEC. Similar findings were made in *Automotive Bearings*, thereby setting a precedent in this regard.

AAEC is a standard of harm to competition – somewhat akin to substantial or significant lessening of competition in other jurisdictions – that is necessary for the CCI to prove that a contravention took place. As such, it is not the CCI’s argument that the cartels did not cause competitive harm in the market.

The cartels took place and any alleged benefit would have been enjoyed by the parties during the pre-covid-19 period. Thus, the cartel participants, including some of those who admitted to participating, were fortunate to get away with no fines because their cases were decided during the covid-19 pandemic.

Interestingly, in both cases, those admitting to the conduct did not get any special benefits for their disclosure and were treated similarly to those who refuted the cartel conduct despite direct evidence.

This is a diversion from precedents where the CCI has viewed an admission of guilt in a different light by granting immunity in the case of leniency applications or treating the admission as a mitigating factor during the determination of a penalty. It is worth noting that back in 2017, when these parties were engaged in their cartel conspiracy, the CCI held in a different case involving public procurement that “since public procurement involves use of taxpayer’s money and consumer welfare, bid rigging should be viewed as one of the most pernicious anticompetitive conduct inviting serious penalty to serve as a deterrent.”

## Would this mean a more lenient approach for cartels hatched during COVID?

Since the onset of the pandemic, antitrust authorities across the world have been issuing advisories and guidelines cautioning businesses on how antitrust laws continue to apply. However, under certain circumstances, conduct which may otherwise violate antitrust laws would be allowed during covid-19 due to the unprecedented situation. Like its peers, the CCI issued an advisory cautioning business not to “exploit” the situation to enter into anticompetitive activities. It clarified in its advisory that the Competition Act is broad enough to account for efficiencies and business justifications during covid-19. The authority said it would have due regard to such justifications while assessing a case. This meant that the authority might allow any anticompetitive activity that could be objectively justified due to the covid-19 pandemic.

However, the two orders described above indicate that any cartel hatched even before the global health crisis may not be viewed strictly in the interest of justice. This begs the question that if cartels hatched before the pandemic receive a light-touch approach by the CCI, then would cartels hatched during covid-19 also be dealt with similarly? Ideally, they should be. It will also be interesting to see whether based on these decisions, the time at which the anticompetitive activities were conducted could be taken as a mitigating factor to argue for no penalties. Whether parties will be able to use the same argument in the post-covid-19 era is anybody’s guess.

The CCI’s covid-19 advisory cautions that activities otherwise considered anticompetitive but justified through efficiency-enhancing factors during the pandemic may not cause an AAEC. However, if the pandemic is a valid justification for not imposing fines even when conduct causes an AAEC, would it still be relevant for parties to attribute weightage to show that no AAEC was caused by their conduct? If these above orders are precedents – AAEC or no AAEC – parties could be certain that covid-19 is a green card for a light-touch approach on penalties by the CCI.

With these two orders, the CCI has clearly set a low threshold for creating deterrence to businesses contemplating whether to indulge in anticompetitive activities during the covid-19 pandemic.

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