Competition Law Hotline

April 29, 2022

TYRE CARTEL: THE CCI ROLLS-ON WITH PRICE PARELLELISM "PLUS" AGAINST TYRE MANUFACTURERS

Actionable Insights

- The CCI's decision in the *Tyre Cartel Case* continues its approach of "price parallelism plus", especially in the context of oligopolistic markets demonstrating high levels of concentration, and dealing in a homogenous and commoditized product.
- The decision is a reminder of *Do's and Don'ts* while participating in industry association meetings. Particularly any exchange of competitively sensitive information (including pricing, production and dispatch information) are likely to fall foul of the Competition Act.
- The decision underscores the need for well-structured competition law training and compliance programmes by companies, and the need to maintain justifications and documentations for market facing decisions taken by the management.

INTRODUCTION

In what may appear to be a typographical error, the Competition Commission of India (**CCI**) on 2 February 2022, issued an *Order dated **31 August 2018*** imposing cumulative penalties of INR 1788 Crores upon five major tyre manufacturers (Apollo Tyres, MRF, CEAT, JK Tyres and Birla Tyres) and the Automotive Tyres Manufacturers Association (**ATMA**), for contravening provisions of Sections 3(1) and (3) of the Competition Act, 2002 (**CA02**).[1] Not suprisingly, the steep penalties imposed under the CCI's 2018 Order led to wiping off 4.66% of the aggregate market capitalization of the five tyre manufacturers, shorly after the publication of the Order.[2]

While the Director General (**DG**)'s investigation was concluded in 2016, and subsequent proceedings before the CCI were concluded as early as 2018, the Final Order was withheld and kept in sealed cover in accordance with the directions of the High Court of Madras.[3] Subsequent to the Madras High Court and Supreme Court rejecting the tyre manufacturers' pleas against the validity of the CCI's Orders on grounds of procedural improprieties associated with the initiation order *(under Section 26(1) of the CA02)* and the Ministry of Corporate Affairs (**MCA**)'s reference to the CCI on the subject matter – the CCI issued and published its Final Order on 2 February 2022.[4]

In this Hotline, we review the Final Order of the CCI, and analyse how the CCI's Final Order in the *Tyre Manufacturers' Case* takes sits with the CCI's existing jurisprudence on cartels, and what it means for businesses' looking to mitigate risks of anti-competitive dealings.

GENESIS OF THE INVESTIGATION

The investigation, which was intiated by the CCI in 2014, is not the first inquiry into alleged collusive practices in the tyre industry – with earlier investigations having been undertaken under the erstwhile Monopolies and Restrictive Trade Practices (**MRTP**) Act as well.[5] After all, the tyre industry is arguably one of the more concentrated industries in India with five major tyre manufacturers representing approximately 83% of the market measured by turnover.[6] However, the present order represents the first adverse order against tyre manufacturers, and one of the steeper penalties imposed under the CA02.

Resultantly, when the MCA acting upon a representation from the All India Tyre Dealers' Federation (**AITDF**) shared a reference with the Competition Commission of India (**CCI**) suggesting potential collusion amongst major tyre manufacturers to fix prices of cross-ply/bias tyres,[7] the CCI directed an enquiry to determine the existence of any agreement or understanding, which could contravene the provisions of Section 3 of the Competition Act, 2002 (**CA02**).

The MCA's reference maintained that despite signficant price fluctuations in input costs, including repeated drops in natural rubber and crude oil prices, the prices of cross-ply/bias tyres were consistently hiked or kept constant, resultantly denying the benefits of input cost reductions on to end consumers. Moreover, it was alleged that the tyre manufacturers had exchanged commercially sensitive information/ pricing strategy, and colluded to fix prices under the banner of the ATMA.

THE DG'S INVESTIGATION

In its investigation, the DG noted the following:

Research Papers

Compendium of Research Papers
January 11, 2025

FAQs on Setting Up of Offices in India
December 13, 2024

FAQs on Downstream Investment
December 13, 2024

Research Articles

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals
January 15, 2025

Key changes to Model Concession Agreements in the Road Sector
January 03, 2025

The Revolution Realized: Bitcoin's Triumph
December 05, 2024

Audio

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice
December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper

1. Whereas input pricing pressures caused a decline in EBIDTA of the tyre manufacturers in the period from 2010 to 2012, subsequent easing of pricing pressures *(with input costs as a percentage of sales revenues going down from 79.45% to around 60%)*, did not translate into a reduction in prices for Truck Bus Bias (**TBB**) Tyres, despite increase in operating margins. The DG considered this as evidence of concerted action amongst tyre manufacturers to artificially keep the prices of TBB tyres at higher levels. The DG also noted that in a competitive market, such price levels could not have been sustained save for concerted action amongst manufacturers.
2. There was a high degree of price parallelism between the prices of the most representative variants of TBB tyres offered by the tyre manufacturers, and that price increases in the 2011 to 2013 period were nearly identical despite the tyre manufacturers operating at different levels of efficiency.
3. There were several "plus factors", which indicated the existence of an understanding, which went beyond mere concisous price parallelism. These included:
    - Regular non-minuted/non-recorded meetings between the tyre manufacturers at various committees/sub-committees of the ATMA – indicating the existence of a platform which could potentially facilitate sharing pricing information and monitoring price movements.
    - Evidence of ATMA having collected and compiled information relating to company-wise and segment-wise data (both monthly and cumulative) on production, domestic sales and export of tyres on a real-time basis.
    - Evidence of e-mail communications between some of the investigated tyre manufacturers, discussing commercially sensitive information and price strategy, in the absence of any evident business rationale for doing so, barring collusion.
    - Stability in production and market share figures of the tyre manufactuers, and parallelism in capacity utilisation figures, coupled with stable pricing practices despite fluctuations in domestic demand.

Taken in totality, the DG observed that the above factors indicated the presence of a cartel amongst tyre manfuacturers, especially in the absence of adequate justifications for the tyre companies pricing decisions – which could have suggested the presence of independent market facing decisions.

ARGUMENTS ADVANCED BY THE TYRE MANUFACTURERS

Rebutting the findings of the DG, the tyre manufacturers *inter alia* pointed to:

1. The independent nature of pricing decisions taken by the tyre companies, which, as argued by the tyre manufacturers, was not influenced by any *inter se* discussions amongst the tyre manufacturers.
2. Errors in DG's selection of reference period, reference prices and comparable product pairs, which in turn, led to errors in the coefficient of correlation between tyre prices.
3. The DG's failure to consider:
    - A shift in demand structure of TBB Tyres, which lead to an increased demand for Truck Bus Radial (**TBR**) Tyres. This, as per the tyre manufacturers explained the low capacity utilisation.
    - The impact of imports on the market for TBB tyre (which increased over the investigation period from 7.22% of total sales to 13.59%)
    - The rationale for information collection conducted under the aegis of the ATMA, i.e. to comply with Government data requests.
    - Evidence gathered through depositions, which clarified the purpose and agenda of various meetings held under the aegis of the ATMA. These included discussions around increasing prices of carbon black, discussions relating to sunset review of anti-dumping duties imposed by the Government, etc
4. Absence of any restrictions under law, which could bar the tyre companies from maintaining higher operating margins.
5. Absence of any evidence to suggest that the nature of discussions held under the *aegis* ATMA related to discussion of anything apart from publicly available information, or evidence to establish that the tyre manufacturers acted upon such information.

THE CCI'S DECISION IN THE TYRE CARTEL CASE

Based on the DG's Report and arguments advanced by the tyre manufacturers, the CCI found that the tyre manufacturers had engaged in cartelisation under the aegis of the ATMA during 2011-12, and that the tyre manufactuers had acted in concert to increase the prices of cross-ply/bias tyres in the truck/bus segment. Resultantly, the CCI directed the tyre companies to cease and desist from indulging in any activity pertaining to the Agreement. The CCI's order extends to the ATMA as well, and directs it to disengage from undertaking any exercise which amounts to an exchange or collection of price information – through the member companies or otherwise.

The CCI's findings are based on the (i) existence of price parallelism; (ii) financial performance; (iii) cost analysis of key raw materials; (iv) circumstances conducive for collusion; and (v) evidence of communication exchanged on emails or through meetings held in private and otherwise. In particular, factors such as the existence of an oligopolistic market, a commoditized and homogenous product, the existence of a platform for exchanging commercially sensitive information, and high-levels of parallelism in production and pricing – were key to the CCI's determination of the existence of a cartel.

As regards certain submissions of the tyre manufacturers relating to consideration of imports, etc. the CCI noted inherent inconsistencies in the arguments advanced including the presence of anti-dumping duties which effectively shielded the domestic industry from competitive imports. Similarly, the CCI dismissed the presence of any irregularities/errors in the DG's economic analysis, including with respect to selection of the reference period, reference prices and product pairs.

The CCI imposed penalties at the rate of 5% of the average turnover of the tyre manufactuers for the last three

on Simplification of registration for FPIs
September 26, 2024

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024

preceding financial years i.e. Rs. 425.53 crore on Apollo Tyres, Rs. 622.09 crore on MRF Ltd., Rs. 252.16 crore on CEAT Ltd., Rs. 309.95 crore on JK Tyre and Rs. 178.33 crore on Birla Tyres. A penalty of Rs. 0.084 crore was imposed on ATMA for facilitating and promoting the price discussions.

In addition, the persons who at the time of such contravention were in charge of and responsible for the conduct of the business, have also been held liable under Section 48 of the Act, thereby making them liable to payment of pecuniary penalties amounting to 5% of their average annual income for the three financial years preceding the date of the Order.

THE LAW ON CARTELS IN INDIA

As per Section 3(3) of the CA02, the existence of a cartel needs to be established on the basis of an *agreement* between competitors to fix prices, limit or control supply, production, markets, technical development, investment or provision of services, share or allocate markets or rig bids. Once the existence of such an agreement is established, the CA02 presumes the agreement to be causing an appreciable adverse effect on competition (**AAEC**), thereby contravening the provisions of Section 3 – which prohibits all agreements (amongst competitors or between entities operating at different levels of a supply chain) which cause or are likely to cause AAEC. While the presumption of AAEC under Section 3(3) may be rebutted by demonstrating the existence of a pro-competitive efficiency enhancing joint ventures.

As for the existence of an *agreement,* the CA02 provides a widely worded definition, which includes "*any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings.*" Resultantly, instances of tacit collusion are also considered to be an *agreement* for the purposes of Section 3(3).

The DG's approach to establishing an agreement in the *Tyre Cartel Case* is premised primarily on evidence of (a) price parallelism; and (b) other 'plus factors' such as the existence of a forum to exchange commercially sensitive information including pricing strategy, i.e. ATMA. Past decisions of the CCI, appear to validate this approach, wherein mere conscious parallelism is insufficient to establish an *agreement.* However, when evaluated against an evidentiary standard of *preponderance of probabilities,* price parallelism taken together with other "plus factors" indicating the existence of collusive behaviour, are considered sufficient to establish the existence of an *agreement* for the purposes of Section 3(1) of the CA02. For instance in the *Cement Cartel Case*, the CCI's approach, eventually upheld in appeal by the NCLAT, was premised upon the platform provided by the Cement Manufacturer's Association (**CMA**) for exchanging information, coupled with evidence of price, dispatch and production parallelism.[8]

As with the *Tyre Cartel Case*, while the CMA argued that information exchange was necessitated on account of Government data requests, the CCI held that sharing such information amongst CMA's members would have facilitated collusion on prices, something that is also borne out by parallelism exhibited in the industry.

Typically, the existence of trade associations which could act as forms for information exchange, and evidence of information exchange itself has been relied upon quite extensively in CCI's decisions relating to cartels. Information exchange, in and as of itself *(i.e. in the absence of evidence to demonstrate actions taken on the basis of such commercially sensitive information)* has been relied upon as evidence of an anti-competitive agreement in the *Paper Cartel Case*[9]and the *Beer Cartel Case*.[10]

The only notable exception remains the *Flashlight Cartel* case, where despite parties having admitted to exchange of commercially sensitive information including pricing information as a part of their application under the CCI's Lesser Penalty Regulations,[11] the CCI did not find the existence of an anti-competitive agreement – owing to the lack of evidence ot establish an agreement to act upon such information and fix prices, or limit or control production, supply, markets, technological development or investments.

The *Flashlight Cartel* case remains an outlier. While admittedly the CCI's decision in the *Tyre Cartel* Case is dated, in that the views in the CCI's Order date back to 2018, the findings remain relevant and reflective of the CCI's approach to evaluating evidence towards establishing the evidence of a cartel.

The *Tyre Cartel Case* also brings out some additional factors that have not been relied on previously by the CCI for arriving at its adverse inferences. These *inter alia* include high operating margins, circumstantial evidence to point to end-consumer lock-in *(the CCI observed that the price differential between TBB tyres and its closest product substitute, i.e. TBR tyres was high enough to lock-in end consumers in the tyre replacement market to TBB tyres)*, the absence of competitive pressures from exports, and the lack of minutes for ATMA's committee meetings despite the association having been previously investigated on allegations of collusive conduct.

HOW IS THE DECISION RELEVANT FOR BUSINESSES?

Participation in industry/trade association meetings are not *per se* frowned upon under competition laws. Industry/ trade associations provide useful avenues for discussing and advocating industry wide issues, and may enable meaningful policy change. However, as the CCI's decisional practice increasingly suggests, collection or exchange of competitively sensitive information, such as information relating to pricing strategy, production and capacity utilization, dispatch and sales, may be viewed as an anti-competitive agreement for the purposes of the CA02. While the *Flashlight Cartel* case did indeed stop short of viewing information exchange as a standalone evidence of an anticompetitive agreement in the absence of any further evidence of actioning such information, it remains an outlier.

Given that most association meetings are likely to involve participation form the same set of officials, even a one-off inadvertent slip-up may also pave the way for adverse findings of concerted practice. Therefore, it becomes extremely important for businesses to know what to discuss and what not to discuss with each other and how to conduct themselves at meetings of their respective associations. It is even more important for the association themselves to implement such governance and hygiene measures which ensures that no concerted action takes place between the members.

Likewise, companies would be well-advised to develop compliance and training programs, and ensure independent justification and documentation of firm-level market facing decisions (such as pricing, supply and marketing strategies), alongside proactive measures to prevent exchange of competitively sensitive information amongst

employees and competitors.

In this regard, companies may consider the following while approaching their interactions with industry/ trade assocaitions:

1. ***Email Communications*:** Ensure that email correspondences with external stakeholders (especially employees and officers of competing businesses, and officials and employees of trade associations) do not contain any competitively sensitive information related to their businesses.
2. ***Information Exchange at Common Fora*:** Ensure that information exchange is limited to industry-level issues, and does not relate to competitively sensitive information of any level of granularity (firm-level or industry-level) unless such information is aggregated at an industry level, publicly available and does not directly or indirectly disclose firm-level market facing strategies. Appropriate institutional firewalls must be put in place to ensure that offials in charge of information collection and aggregation are unable to share any firm-level data with members of such fora.
3. ***Discussions and Meetings at Common Fora:*** To the extent possible discussion around competitively sensitive information, including marketing and pricing strategies should be avoided. While in-principle and non-specific discussions around industry practices may be held, as a measure of good practice video/audio recording of meetings should be conducted, or at the very least all meetings should be minuted.

If participants inadvertently/ consciously disclose or discuss any competitively sensitive information, it is advisable to object to the same, and cease participation in such meetings. The objection should be recorded in the minutes.

– Indrajeet Sircar & Ratnadeep Roychowdhury

(With special thanks to Vinay Shukla)

You can direct your queries or comments to the authors

[1] *See*, *In Re: MCA v. Apollo Tyres Ltd. & Ors.*, Reference Case No. 08 of 2013, 31 August 2018, Available at URL: https://www.cci.gov.in/sites/default/files/08-of-2013.pdf

[2] *See*, Bhatnagar R., "Shares Of Apollo Tyres To MRF Fall As CCI Levies Rs 1,800-Crore Fine For Cartelisation", Bloomberg Quint, 3 February 2022, Available at URL: https://www.bloombergquint.com/business/cci-levies-rs-1800-crore-fine-on-tyremakers-for-cartelisation

[3] *See*, Competition Commission of India, "CCI imposes penalty on Tyre manufacturers and their Association for indulging in cartelisation", Press Release No. 65/2021-22, 2 February 2022, Available at URL: https://www.cci.gov.in/sites/default/files/press_release/PR65-2021-22_0.pdf

[4] *See*, M/s MRF Limited v. Ministry of Corporate Affairs & Ors., WA No. 259 of 2018, 6 January 2022, Available at URL: https://www.livelaw.in/pdf_upload/mrf-limited-v-ministry-of-corporate-affairs-and-ors-407252.pdf; A Division Bench of the Hon'ble Madras High Court vide an order dated 06.01.2022, dismissed the Tyre Manufacturer's Writ Appeal. SLPs filed by the Tyre Manufacturers against the Madras HC's Order before the Hon'ble Supreme Court, were dismissed vide the Supreme Court's Order dated 28.01.2022.

[5] *See*, In Re: All India Tyre Dealers' Federation v. Tyre Manufacturers, MRTP Case RTPE No. 20 of 2008, 30 October 2012, Available at URL: https://www.cci.gov.in/sites/default/files/202008_0.pdf

[6] *Supra* Note. 1 at Para 6

[7] Cross-ply or bias construction is a method of constructing tyres in which a series of cords or plies criss-cross over each other to form a carcass or frame over which rubber is integrated to create a tyre that bears the load of the vehicle. While inexpensive when compared to their successors radial tyres, cross-ply/bias tyres tend to increase friction resultantly reducing fuel economy and leading to faster wear and tear.

[8] *See*, *In Re: Builders Association of India v. Cement Manufacturers Association & Ors.*, Case No. 29 of 2010, 31 August 2016, Available at URL: https://www.cci.gov.in/sites/default/files/Final%20Order%2029%20of%202010%2031.08.2016%20.pdf

[9] *See*, *In Re: Anti-competitive conduct in the paper manufacturing industry*, Suo Motu Case No. 05 of 2016, 17 November 2021, Available at URL: https://www.cci.gov.in/sites/default/files/05-of-2016_0.pdf

[10] *See*, *In Re: Alleged anti-competitive conduct in the Beer Market in India*, Suo Motu Case No. 06 of 2017, 24 September 2021, Available at URL: https://www.cci.gov.in/sites/default/files/06-of-2017.pdf

[11] *See*, *In Re: Alleged Cartelisation in Flashlights Market in India*, Suo Motu Case No. 01 of 2017, 6 November 2018, Available at URL: https://www.cci.gov.in/sites/default/files/SuoMoto-01-of-2017.pdf