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## Comparative Analysis of Cartelization in the Pharmaceutical Industries of India and the United Kingdom

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### Abstract

*Now-a-days the cartels are disturbing and distorting the competition markets, in all the field of its concern, the illegal cartels may leads to various unscientific paths towards monopolization of the markets, through the right to health is fundamental right in India, but the authorities are failed to guarantee the same to citizens of the country, even many apex courts judgments mandated the Government responsibility is to ensure the pollution free environment passes to generation to generation. In the connection the illegal cartels in the competition market in India and United Kingdom (UK) are responsible for violation of right to health and crating unfair practice in the markets. The Competition Commission of India and Competition Market Authority (CMA) in UK are the responsible for regulating the observing the illegal cartels and ensure the free from unfair trade practice, in this connection the authorities have been taken many initiatives the curb illegal cartels. This paper adopted the comparative analysis based on the Indian Competition Market as well as the UK Competition laws, and researcher have drawn the conclusion at the end after careful analysis the present scenario on the competition markets.*

### Keywords

Right to health, Cartels, Competition Commission of India, Competition Market Authority, Unfair Trade Practice, Monopolies Restrictive Trade Practice.

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## **Comparative Analysis of Cartelization in the Pharmaceutical Industries of India and the United Kingdom**

### **1. Introduction**

Antitrust or competition law encompasses two main categories of offenses: exploitative and exclusionary. A classic example of an exploitative offense is a cartel, where prices are raised to the detriment of buyers and, ultimately, consumers. Conversely, an exclusionary offense, such as a boycott, is employed to enforce a cartel. In the case of a boycott, cartel members actively keep outsiders at bay to safeguard their enterprise, making it a form of exploitative action that utilizes exclusionary tactics to achieve its aims.

A lingering query within the realm of antitrust is whether its scope extends beyond addressing exploitative practices. Does antitrust exclusively target anticompetitive behaviour associated with exploitation, focusing solely on preventing firms from artificially diminishing market output and inflating prices, as illustrated in the familiar triangles and rectangles of economists' diagrams? Alternatively, does antitrust also encompass violations related to exclusionary practices, distinct from the overall loss of consumer wealth?

### **2. Understanding Cartels**

Certain agreements or practices, due to their detrimental impact on competition and absence of any redeeming qualities, are unequivocally deemed unreasonable and therefore illegal. This classification, including cartels, entails agreements that are considered inherently harmful to consumers and the overall economy. Consequently, these agreements are deemed illegal without the need for a detailed inquiry into the specific harm caused or the business justifications for their implementation.

Globally, cartels are recognized as one of the most disruptive behaviours within any competition framework. This unfair practice involves collusion among competitors, primarily in the form of price fixing, resulting in a diminished array of choices for consumers.

Cartelization distorts prices and adversely affects the overall competitive landscape in the market. The seriousness of this conduct is underscored by the fact that cartels face the highest penalties under the Competition Act, highlighting the gravity with which such practices are addressed.

The term 'cartel' serves as an umbrella expression encompassing various collusive arrangements among businesses, including:

- (a) Direct or indirect price fixing between businesses, where two or more entities agree to elevate the price of their product or service instead of independently setting prices and competing in the market-referred to as price fixing.
- (b) Restricting or obstructing supply or production between businesses, wherein two or more entities agree to limit or impede the supply or production of a product.
- (c) Allocating customers or potential customers between businesses, where two or more entities agree not to solicit each other's customers, and/or one entity refrains from competing with another in a specified area in exchange for a reciprocal arrangement-known as market sharing.
- (d) In response to a third party's request for a contract tender, engaging in a clandestine agreement among businesses where one or more entities pledge not to bid for the contract or deliberately submit an artificially high price to facilitate another business in winning the contract. This practice, known as bid rigging, may involve reciprocal favors in future contract tenders.

### **3. Structural Factors Facilitating Cartelization**

It is widely acknowledged that cartelization can manifest in various industries, with cartels seeking to dominate entire markets. Certain terms or characteristics within a market make it conducive for firms to exercise control. Authorities are inclined to believe that the likelihood of cartelization increases when the following structural factors are prevalent in a product market:

- (a) High market concentration;
- (b) Demand and supply dynamics;
- (c) Homogeneous product characteristics;
- (d) Entry barriers;
- (e) The presence of an active trade association;
- (f) Factors conducive to collusion;

- (g) Exclusive market control; and
- (h) An exploitative market environment.

Fundamentally, the Monopolies Restrictive Trade Practices 1969, which predates the Act, lacked explicit definitions for terms such as cartels, collusion, price fixing, bid rigging, etc. However, the new legislation, The Competition Act, 2002, introduced significant refinements to these concepts. It broadly categorizes anti-competitive agreements as either horizontal or vertical. Horizontal agreements, encompassed by section 3(3) of the act, and vertical agreements, falling under section 3(4), are highlighted. This segment focuses on the former, where cartels primarily reside. These agreements are presumptively deemed to have an Appreciably Adverse Effect (AAE) within India.

In accordance with Section 2(c) of the Competition Act, 2002, a 'Cartel' is defined as "An association of producers, sellers, distributors, traders, or service providers who, by mutual agreement, restrict, control, or attempt to control the production, distribution, sale, or price of, or trade in goods or the provision of services."

Section 3(1) stipulates that "No enterprise or association of enterprises shall engage in any agreement concerning the production, supply, distribution, storage, acquisition, or control of goods or provision of services that causes or is likely to cause an appreciable adverse effect on competition within India." Additionally, Section 3(3) of the Competition Act addresses specific types of agreements or arrangements among individuals, enterprises, or associations engaged in identical or similar trades of goods or provision of services, deeming them per se illegal.

According to Section 3(3) of the Competition Act, agreements, including cartels, are considered to cause an appreciable adverse effect on competition (AAEC) in India if they:

- (a) Directly or indirectly determine purchase or sales prices;
- (b) Limit or control production, supply, markets, technical development, investment, or provision of services;
- (c) Involve the sharing of the market or sources of production or provision of services through the allocation of geographical areas, types of goods or services, number of customers, or similar means; and
- (d) Directly or indirectly result in bid rigging or collusive bidding.

#### **4. Categories of Cartels**

Horizontal agreements involve collaborations between two or more enterprises operating at the same stage of the production chain and within the market. The shared market aspect implies that the parties involved in the agreement must be producers, retailers, or wholesalers. Four main types of cartels are widely acknowledged, and they are elucidated below:

- (a) Price fixing;
- (b) Market sharing;
- (c) Output controls/limiting production; and
- (d) Bid rigging.

The Committee observed that the Competition Commission of India operates within a clearly defined legal framework, ensuring legal certainty and transparency for all parties involved. This structure grants full opportunities for parties to exercise their rights and provides robust legal protection against arbitrary decisions and inquiries, including cases involving market sharing, consumer interests, price impacts, illegal cartelization, and the availability of relevant products. As part of this commitment, India joined TRIPS, anticipating enhanced access for its citizens to innovative medicines.

The pharmaceutical industry in India has experienced consistent growth, reaching a market size of USD 27.57 billion in 2016-17. Approximately 91 percent of this market is attributed to Over-the-Counter (OTC) and generic formulations. The Competition Commission of India (CCI) has diligently examined practices within the pharmaceutical sector, and its interventions have been instrumental in bringing about noteworthy changes across the industry. Government committees have also acknowledged the significant role played by the CCI in ensuring that the pharmaceutical sector in India achieves efficient outcomes aligned with public interest, economic development, and consumer welfare.

Since its establishment, the CCI has issued final orders in thirteen (13) cases related to cartelization in the pharmaceutical sector. Among these, three (3) investigations were transferred to the CCI from the erstwhile MRTPC, two (2) were initiated by the CCI on a suo-motu basis, and the rest were commenced by the CCI based on information received under the provisions of Section 19(1)(a) of the Competition Act. These investigations have been focused on the

pharmaceutical distribution chain, particularly targeting the All India Organization of Chemists and Druggists (AIOCD) and various other state-level associations of chemists and druggists.

The inaugural substantive order issued by the CCI in this context pertained to the case of Varca Druggist & Chemist & Ors. Vs. Chemists and Druggists Association, Goa. The informant alleged that the Chemists and Druggists Association, Goa (CDAG), had been imposing restrictive guidelines on companies. Similar circumstances were examined by the CCI in two other cases transferred from the Director General of Investigation and Registration (DGIR-MRTPC): Vedant Bio Sciences vs Chemists & Druggists Association of Baroda and Belgaum District Chemists and Druggists Association v. Abbott India Ltd. & Others. In response, the CCI issued a prima facie order under Section 26(1) of the Act, instructing the DG to initiate an investigation into the matter.

Following this, the CCI received cases presenting similar allegations against state-level and district-level associations in Karnataka, Goa, Himachal Pradesh, Assam, and Kerala. Additionally, the CCI initiated suo-motu investigations into the practices adopted by state and district-level associations in West Bengal and Goa.

After the initial determinations by the CCI regarding cartel-like behaviour in the pharmaceutical distribution sector, where individual members of various chemists and druggists associations were implicated, the CCI moved beyond assessing the turnover and receipts of the associations. It imposed individual penalties on the members of the association in accordance with Section 48 of the Act. In the case of Re: Bengal Chemist and Druggist Association, the CCI imposed penalties at a rate of 10 percent of the respective turnover/income/receipts of the office bearers of the association directly responsible for its affairs and actively involved in decision-making. It also imposed penalties at a rate of 7 percent of the respective turnover/income/receipts of the members of the association's executive committee.

Given the size and significance of the pharmaceutical sector in India, the CCI not only enforced the provisions of the Act but also (i) conducted targeted advocacy and (ii) issued public notices emphasizing the importance of fair and competitive conduct. Consequently, instances of boycotts and restrictive terms and

conditions imposed on pharmaceutical companies have significantly decreased. In fact, the AIOCD issued a circular to all its members and state-level associations conveying this directive.

Dr. Reddy's Laboratories (DRL) is confronted with an antitrust complaint in the U.S. regarding its wholly-owned subsidiary. The subsidiary is named as a defendant in a lawsuit filed in a U.S. court concerning the sale of both brand and generic cancer drug Revlimid. Mayo Clinic and Lifepoign Corporate Service have implicated not only DRL but also several other pharmaceutical companies in their allegations. The complainants assert that the defendants engaged in improper practices to restrict competition and sustain a shared monopoly in the sale of both brand and generic Revlimid.

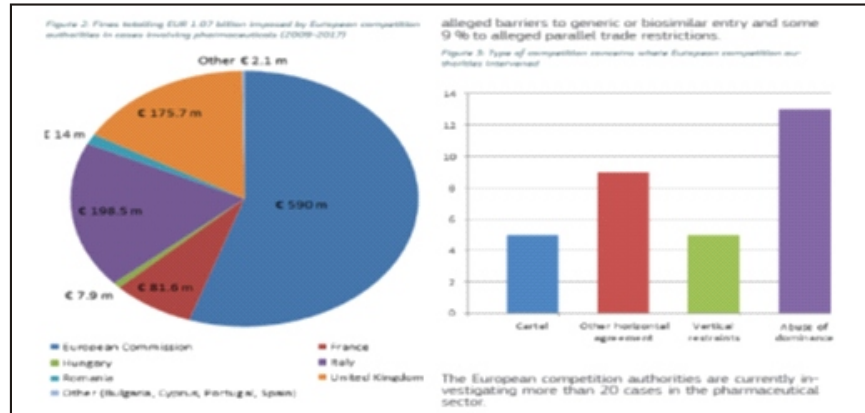
In December 2013, the CCI decided two more cases against the All India Organization of Chemists and Druggists (AIOCD) and its regional affiliates. The first one was filed by M/s. Peeveear Agencies, alleging that the AIOCD, All Kerala Chemists & Druggists Association (AKCD), Organization of Pharmaceutical Producers of India (OPPI), Indian Drug Manufacturers Association (IDMA) and Janssen-Cilag Pharmaceuticals are limiting and restricting the supply of pharmaceutical drugs. The second one was filed by M/s Sandhya Drug Agency of Barpeta against Assam Drug Dealers Association (ADDA), Barpeta Drug Dealers Association, (BDDA), All India Organization of Chemist and Druggists (AIOCD) and Alkem Laboratories Ltd, alleging stoppage of the supplies of products of Alkem which was done by ADDA and BDDA in collusion with AIOCD.

The Competition Act provides the CCI with leniency provisions and grants authority to the Director General to conduct search and seizure by invoking sections 240 and 240A of the Companies Act, 1956. Furthermore, the jurisdiction of the Competition Act encompasses agreements specified in section 3 that have been made outside India. It also covers any party to such agreements located outside India.

## **5. Cartel Presence in the Pharmaceutical Sector in the United Kingdom**

According to a report issued by the Commission to the Council and the European Parliament on Competition Enforcement in the Pharmaceutical Sector (2009-2017), the Commission made over 29

decisions, identifying infringements or accepting binding commitments in antitrust investigations related to pharmaceuticals for human use. The accompanying graph illustrates fines amounting to EUR 1.07 billion imposed by European Competition Authorities in cases involving pharmaceuticals between 2009 and 2017.



After the conclusion of the EU Exit Transition Period on December 31, 2020, EU law ceased to be applicable in the UK. The Competition and Markets Authority (CMA) will now exclusively investigate suspected violations of UK domestic competition law concerning conduct occurring both before and after December 31, 2020. Therefore, the CMA's ongoing investigation in this case, post the Transition Period, is conducted solely under the Chapter I prohibition outlined in the Competition Act 1998.

The CMA serves as the primary enforcement authority, possessing jurisdiction to investigate and prosecute alleged criminal and civil cartels under Chapter I, Section 2 of the Competition Act, 1998, following Brexit.

The Enterprise and Regulatory Reform Act, 2013 (ERRA13), which came into effect in 2014, introduced significant changes to the criminal cartel offenses established by the Enterprise Act 2002 (EA02). According to these provisions, individuals commit an offense if they agree with one or more persons or undertakings to engage in prohibited cartel arrangements, such as price fixing, market sharing, bid rigging, and limiting output. In England and Wales, prosecutions for criminal cartels may only be initiated by the Competition and Markets Authority (CMA) or the Serious Fraud Office (SFO), or with the consent of the CMA. The CMA typically undertakes the role of prosecutor. The creation of criminal cartel offenses under the EA02 was intended to criminalize individuals' behaviour.



The CMA issued an open warning letter to a Limited Liability Partnership (LLP) associated with eye doctors, accusing them of engaging in anti-competitive activities and violating the Competition Act 1998. The LLP was fined £500,000. The CMA's investigation revealed the following observations:

- (a) The LLP refused to accept lower fees offered by an insurer and instead charged higher fees for self-pay patients.
- (b) The LLP negotiated and entered into price-fixing and price arrangements with insurers.

These findings led to the enforcement action and the imposed fine.

On October 10, 2017, the CMA initiated an inquiry under Chapter 1 of the Competition Act 1998 (CA 98) and Article 101 of the Treaty on the Functioning of the European Union (TFEU). This investigation was focused on suspected violations of competition law involving multiple parties. The inquiry specifically delved into alleged anti-competitive agreements and/or concerted practices concerning generic pharmaceutical products.

In a recent investigation, the CMA uncovered illicit arrangements between Alliance Pharmaceutical, Lexon Medreich, and Focus (Advanz) Pharma. These companies had engaged in an exclusive market agreement for the supply of prochlorperazine POM, a prescription anti-nausea drug. As part of the arrangement, Lexon agreed not to compete with Alliance Pharma in the supply of this prescription drug. Subsequently, these companies faced fines imposed by the CMA.

In the case involving liothyronine tablets, the CMA determined that Advanz Pharma, along with Cinven and HG Capital LLP, had abused its dominant position, violating Section 18 of the Competition Act 1998. This violation was due to the imposition of excessive and unfair prices for Liothyronine Tablets. The CMA imposed penalties, and upon appeal to the Competition Appellate Tribunal, the findings of liability were upheld in all aspects, with the fine being adjusted to £84.2 million.

In a separate case concerning excessive and unfair pricing related to Hydrocortisone tablets (Auden Mckenzie (Pharma) Limited and Another v Competition and Market Authority), the CMA made allegations. The companies involved, including appellants like Allergan Plc, Amdipharm UK Limited, Amdipharm Limited, Advanz Pharma Services Limited, Advanz Pharma Corp Limited, Cinven

(Luxco 1) Sarl, Cinven Capital Management (V) General Partner Ltd, Cinven Partners Llp, Auden Mckenzie (Pharma Division) Limited, Accord Uk Limited, Intas Pharmaceuticals Limited, appealed to the Competition Appellate Tribunal against the CMA's decision. The case concluded on September 29, 2023, with the Tribunal upholding the CMA's decision against the mentioned appellants.

In the Nortriptyline tablet case, the CMA's investigation revealed allegations of an anti-competitive agreement. Four entities, including Lexon (UK), were found in violation, leading to a penalty of £1,220,383. Lexon contested the CMA's penalty and appealed to the appellate tribunal, but the Competition Appeal Tribunal (CAT) upheld the decision made by the CMA.

In the case involving Fludrocortisone acetate tablets, the CMA discovered that between March and October 2016, Aspen Pharmacare Holdings Limited, Aspen Global Inc., Aspen Pharma Ireland Limited, Aspen Pharma Trading Limited (collectively, Aspen), Amilco Limited (Amilco), and Tiofarma B.V. and Tiofarma Beheer B.V. (together, Tiofarma) breached Chapter I of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union. This violation occurred through their engagement in an anti-competitive agreement concerning the supply of fludrocortisone acetate 0.1 mg tablets in the UK. All three companies acknowledged their breach of competition law. The CMA imposed fines totaling £2.3 million in relation to the supply of this life-saving drug.

## **6. Conclusion**

Upon discovering a cartel involving doctors, pharmaceutical companies, and diagnostic laboratories exploiting patients, the Madras High Court initiated suo moto proceedings. The court expressed the need for a separate union ministry for pharmaceuticals and the implementation of a Uniform Code of Pharmaceutical Marketing Practices to curb unethical marketing. Fourrts (India) Labs Pvt Ltd alleged overpricing and unnecessary prescriptions, violating India's Competition Law. The National Pharmaceutical Pricing Authority, responsible for setting affordable drug prices, should also investigate pharmaceutical cartels engaging in illegal practices like price fixing, market sharing, and bid rigging.

Although the Competition Commission of India (CCI) has addressed cases related to anti-competitive practices in distribution,

involving industry/trade associations, its 20 years of experience may benefit from collaborative efforts with Medical Associations, the Medical Council, and Pharmaceutical authorities to investigate cartels in India.

Over the years, the CCI has adjudicated cases where trade associations restricted competition through measures like mandatory no objection certificates for stockist appointments and mandatory Product Information Service charges for introducing new drugs. Antitrust scrutiny also focused on associations determining trade margins and controlling discounts at wholesale and retail levels.

In the United Kingdom, the Competition and Markets Authority (CMA) has taken action against pharmaceutical companies for anti-competitive practices, including cartels, market sharing, price fixing, and bid rigging. While the CMA has investigated numerous cases, the persistence of cartels necessitates continued vigilance for the health and competition in the industry. Post-Brexit, the UK should prioritize competition policy, and the CMA, operating under Chapter II of the Act 98, requires a specific strategy to address various forms of anti-competitive activities beyond the Competition Act, 1998.

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