

## LITMUS TEST OF COMPETITION LAW: BUYER'S CARTEL

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### ABSTRACT

‘Competition’ is mostly a progressive word. It is a critical driver of performance and also gives life to innovation. Competition is beneficial to the society as a whole, at the same time, profit making institutions need to acquire market to earn more profit. Competition generally gives a societal benefit, therefore the consumers must also get adequate benefit of fair trading prevalent in the market. The competition law is intended to protect buyers but the legislation has manifestly lacked in interpreting the buyers’ cartel. The previous legislation used to restrict the buyers from entering into such anti- competitive agreements which may eliminate fair competition from the market. However, the Competition Act, 2002 fails to acknowledge the concept of buyer’s cartel.

The authors will emphasise on the ability of buyers’ to form a cartel and how this practice lead to unfair trade practices. The reason to eliminate such agreements is to promote fair competition as there have been instances where such agreements hamper the economic development. Buyers can also enter into an agreement wherein they fix prices

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beforehand or agree to put such conditions which may jeopardize the rights of the sellers which leads to elimination of competition. The purpose of this article is to show how such agreements can manifestly effect the economic development and must be specifically banned and would be to lay down the intention of the legislation to put an end to such agreements. Further, the authors have considered various instances of Supreme Court, interpreting the Buyers' Cartel which have been analysed in the article. Lastly, a comparison is made with the laws related to buyers' cartel from foreign jurisdictions. "A monopsonist buyer who also enjoys monopoly (cartel power) over consumers will sell to consumers at a higher price than a non- monopsonist."<sup>1</sup>

## **1. HISTORICAL BACKGROUND: THE COMPETITION ACT, 2002**

In India, the law relating to 'fair trade' is recognised since the times of *Arthashastra*, written by *Chanakya* in 3<sup>rd</sup> Century BC.<sup>2</sup> Corporate law is based on the notion of 'shared prosperity', it is nowhere limited to the relation between authority and accountability.<sup>3</sup> Competition law aims to understand the trends of the market by promoting equitable competition in the market.

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<sup>1</sup> HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 256 (3d ed. 2005).

<sup>2</sup> Pradeep Mehta, *Competition policy and governance*, THE FINANCIAL EXPRESS (Oct. 27, 2018), <https://www.financialexpress.com/archive/Competition-policy-and-governance/311040/>.

<sup>3</sup> Renee Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, WASHINGTON UNIV. L. REV., available at <https://wustllawreview.org/wp-content/uploads/2017/09/1-21.pdf>.

The Monopolies and Restrictive Trade Practices Act, 1969 (“**MRTP**”) existed before the Competition Act, 2002 (“**Act**”). The MRTP Act authorized the MRTP Commission, in which the Commission can enquire about practices of corporation in the relevant market.<sup>4</sup> However, the Raghavan Committee after the enforcement of Liberalisation, Privatisation and Globalization (“**LPG**”) policies recommended repealing of the MRTP Act<sup>5</sup> in order to curb such conducts of the enterprises which were detrimental for competition in a market.<sup>6</sup>

The Act has made the Commission, the authority<sup>7</sup> to promote the fair competition in a market.<sup>8</sup> In a modern society, enterprises often compete internationally, there was a need to enact such legislation which could cope with a critical state of affairs of anti-competitive practices.<sup>9</sup> The Act makes the commission responsible to restrict anti-competitive practices viz., anti- competitive agreements, abuse of dominant position<sup>10</sup> and such combinations which have the power to hinder maintenance of the

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<sup>4</sup> Monopolistic Restrictive and Trade Practices Act, § 10, Act No. 53 of 1963.

<sup>5</sup> Indian Competition Law, Report of the High Level Committee on Competition Policy and Law, (October 5, 2018: 3:56 am), [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf); Kerala Bar Hotels Ass’n v. State of Kerala, 2015 SCC Online SC 1385; Udai Dagar v. Union of India, (2007) 10 SCC 306.

<sup>6</sup> Comm’n of India v. SAIL, (2010) 10 SCC 744.

<sup>7</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 27.

<sup>8</sup> Competition Comm’n of India v. Steel Authority of India, [2010] 98 CLA 278.

<sup>9</sup> Verizon Commc’n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); Mondy Ltd. & Kohler Cores and Tubes, Goals of competition Law, [2002] ZACT (LM) at 27 1 87 (S. Afr.), 29 (Daniel Zimmer (ed.), 2012).

<sup>10</sup> Tech. Products v. Bangalore Electricity Supply Co. Ltd., Case No. 58/2011; Nagar Nigam v. Al Faheem Meat Exports, (2006) 13 SCC 382.

competition.<sup>11</sup> The Act aims at sustainability of competition and survival of free trade for new entrants in the market in India<sup>12</sup> by preventing abuse of dominant position.<sup>13</sup>

Section 3 of the Act stipulates that if any agreement<sup>14</sup> between enterprises<sup>15</sup> or association of enterprises or person<sup>16</sup> or association of persons, falls under the category of cartel<sup>17</sup> has an appreciable adverse effect on the competition, then such agreement shall be void.<sup>18</sup> The Section constitutes two types of agreements, namely, horizontal agreements and vertical agreements, and it envisages that if agreement is established between two parties, then it is presumed that such agreement itself has an appreciable adverse effect on the competition.<sup>19</sup> For any agreement to fall under Section 3 or to establish appreciable adverse effect

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<sup>11</sup> Director General v. Puja Enter. Basti, [2013] 116 CLA 126 (CCI); Kerela Film Exhibitors Ass'n v. Competition Com'n of India, Appeal No. 100 of 2015 decided on 4-2-2016; Manju Tharad v. Eastern India Motion Picture Ass'n, [2012] 114 SCL 20 (CCI).

<sup>12</sup> Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, J. COMPETITION LAW & ECON. (Sep. 1, 2008: 2:00 pm), <https://doi.org/10.1093/joclec/nhn021>; Evenett, Simon J., What is the Relationship between Competition Law and Policy and Economic Development? In Brooks, Douglas H. & Evenett, Simon J. (ed.): *Competition Policy and Development in Asia*. London: Palgrave Macmillan, 2005, S. 1-26.

<sup>13</sup> S Chakravarthy, *India's new Competition Act, 2002 - A work still in progress*, 5 Bus. L. Int'l 240 2004; Neha Jain, "Defining Dominance: An Analysis of the Competition Act, 2002" 8 NUALS Law Journal (2014), (October 26, 2018: 5:00 pm), <https://heinonline.org/HOL/P?h=hein.journals/nualsj8&i=185>.

<sup>14</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(b).

<sup>15</sup> *Id.* at § 2(h).

<sup>16</sup> *Id.* at § 2(1).

<sup>17</sup> *Id.* at § 2(c).

<sup>18</sup> Manju Tharad v. Eastern India Motion Pictures Ass'n, [2012] 114 SCL 20 (CCI).

<sup>19</sup> Sodhi Transport Co. v. State of Uttar Pradesh, AIR 1986 SC 1099; R.S. Nayak v. A.R. Antulay, AIR 1986 SC 2045.

on the competition<sup>20</sup>, the Commission is required to look at the factors mentioned under Section 19 of the Act.<sup>21</sup>

## 2. CONCEPT OF ENTERPRISES AND PERSONS UNDER COMPETITION LAW: ECONOMIC ACTIVITY

For the purpose of anti-competitive agreement and abuse of dominant position, the legislation has particularly decided the ambit of the Act. Section 3 clearly says that, any “enterprise” or “association of enterprises” or “persons” or “association of persons”, enters into any agreement which has the tendency to cause an appreciable or apprehended danger to the competition within India, then in that case such agreements shall be declared to be void.<sup>22</sup>

Section 2(h) of the Act defines “enterprises” as a person or any department of the government who is engaged in an activity.<sup>23</sup> That activity must be related to production, supply, distribution, or acquisition of goods.<sup>24</sup> On the other hand, Section 2(l) defines person who includes any individual, company or firm or any other person as mentioned under the provision.<sup>25</sup> The Supreme Court of India has interpreted both terms in the case of *Competition Commission of India v. Coordination Committee*

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<sup>20</sup> Automobiles Dealers Ass’n, Hathras v. Global Automobiles, 2012 Comp.L.R. 827 (CCI).

<sup>21</sup> Yashoda Hospital & Research Centre v. India Bulls Finan. Services, 2011 Comp.L.R. 324 (CCI).

<sup>22</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

<sup>23</sup> Carew & Co. v. Union of India, AIR 1975 SC 2260; Gir Prasad v. Govt. of Uttar Pradesh, [1996] 87 Comp. 623 (MRTPC).

<sup>24</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

<sup>25</sup> Global Mail Ltd. v. U.S. Postal Services, 142 F.3d 208; U.S. Postal Services v. Flamingo Indus., 540 US 736 (2004).

*of Artists and Technicians of West Bengal*,<sup>26</sup> the enterprise and person should indulge in some economic activity.<sup>27</sup> Economic activity<sup>28</sup> is itself defined under the provisions of the Act as activities includes production, distribution, supply, storage and acquisition of articles or goods.<sup>29</sup> If any enterprise or person is carrying out any activity which is related to any service as mentioned above, and if such person or enterprise enters into any agreement or any cartel which has appreciable adverse effect on the competition and such agreement shall be void under Sub-Section 2 of the Section 3 of the Act.<sup>30</sup>

Section 3(3) of the Act states the instances where if any person or enterprise or their associations, if enters into any such cartel to attain any of the instances mentioned under the said Act, then such cartel or act will be illegal per se. To come under the ambit of Section 2(h), as “enterprises”, any person or department of governments need to undertake any economic activity but as for the purpose of defining “person” under Section 2(l), anyone or any individual will fall under such category and need not carry out any economic activity.

Sellers, producers, distributors, or any other person can fall into such categories either in Section 2(h) or 2(l) of the Act and the judiciary has recognized this aspect. However, the activity of ‘buying’ cannot be

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<sup>26</sup> Competition Comm’n of India v. Coordination Comm. of Artists & Technicians of West Bengal, (2017) 5 SCC 17.

<sup>27</sup> Hofner & Elser v. Macroton, (1991) ECRI-1979/ (1993) 4 CMLR 306.

<sup>28</sup> Dalton Indus. Properties v. Else, 2 All ER 30 QBD; Kottayam Co-operative Land Mortgage Bank v. CIT, [1988] 172 ITR 443 (Ker.).

<sup>29</sup> ARJITI PASAYAT & SUDHANSHU KUMAR, GUIDE TO COMPETITION LAW (6th ed. 2016).

<sup>30</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

included in such economic activity<sup>31</sup> thus, it does not come under the ambit of Section 3(1). It is now well-established by the Supreme Court in *C.C.I. v. Coordination Committee*,<sup>32</sup> that the consumers or any person who do not carry any “economic activity” are not in the purview of anti-competitive practices under the Act.

Buyer’s cartel, as will be further discussed, is an important aspect of looking at how such anti-competitive practices can occur.<sup>33</sup> Although, the Supreme Court has not been able to justify this beyond doubt, thereby making the interpretation ambiguous.<sup>34</sup> The intention of the legislature has been the protection of investors and consumer’s welfare but how buyers can also establish monopoly and harm investors as well as competition in the market. This has not been recognised in its full sense. Such cartels can equally harm competition and economy as it is done with the intent to gain strong market position by other market players.<sup>35</sup>

Moreover, the major point is to note that **a buyer can be anyone who buys or purchases a product or a service. Importantly, the end use of that product or service will be irrelevant. Buyers’ cartel can be made not only by the consumers but even by the market players. The**

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<sup>31</sup> *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989).

<sup>32</sup> *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal and others*, (2017) 5 SCC 17.

<sup>33</sup> *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989).

<sup>34</sup> *Suhail Nathani & Ravisekhar Nair, Has the Competition Commission of India (CCI) been an effective regulator?* Legally India, (October 22, 2018: 2:00 pm), <https://www.legallyindia.com/home/has-the-competition-commission-of-india-cci-been-an-effective-regulator-20170718-8664#liprefbox>; Also, some major cases will be discussed below where the court included buyers’ cartel under section 3 of the Act.

<sup>35</sup> *Novus IP User, Transcript of the VIII NLSIR Symposium on Competition Law, NLSIR, Page no. 5 & 6, 2015.*

buying cartels by the other market players can only be made when they are carrying out the activity of purchasing. The cartel must be specifically related to the ‘activity of purchase’. Even then the scope under which such cartels still exists and must equally be restricted, is still alive in the present provision of Section 3 of the Act.

### 3. BUYER’S CARTEL: POSITION UNDER COMPETITION LAW

The unusual question is, if sellers, distributors, traders can form a cartel and establish their monopoly in market, then why not buyers? It will be incorrect to say that buyers can never make any such agreements where they decide the purchasing prices or they can never make any such group and agree not to bid above a certain limit or not bid at the same price and the same quantity. Nor can it be said that they cannot establish such monopoly which can harm competition within an economy.<sup>36</sup> These concept of Buyers’ cartel<sup>37</sup> or buyer power are faced by the general public but still not recognized as an important area for making stringent laws.<sup>38</sup> There may be instances where buyers can collude to make such cartels

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<sup>36</sup> John Asker, *A Study of the Internal Organization of a Bidding Cartel*, AM. ECON. REv. (forthcoming), (October 22, 2018: 3:00 pm), <http://pages.stern.nyu.edu/~jasker/stamps070628.pdf>; *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001); *Fleischman v. Albany Med. Ctr.*, No. 1:06-CV-165, 2008 WL 2945993; *Del. Health Care, Inc. v. MCD Holding Co.*, 893 F. Supp. 1279 (D. Del. 1995); *All Care Nursing Serv. Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740 (11th Cir. 1998).

<sup>37</sup> Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1569-70 (1982).

<sup>38</sup> Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 405-06 (2008); Robert Lande & Howard Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, Wis. L. REV. 941, 951-53 (2000).



which results in the elimination of the competition within India,<sup>39</sup> or institute control and monopoly over the sellers or distributors or producer or can even resell it to the consumers at higher prices.<sup>40</sup> There are also other such instances where buyers, using their buying power have misused the unintended protection given by the legislation, and decided the purchasing prices and fixed the quantity to be purchased by each buyer in a group.

It is a felony and unacceptable for the market economy, if the agreement between only the sellers, distributors, traders, make such anti-competitive agreement but not between buyers. In other words, the important point pertinent to note here is that any such anti-competitive agreements if entered by the seller, distributors, traders or any other person as mentioned in Section 3 of the Act, shall be void, and in the context of such agreement of buyers', nothing has been specified in the legislation.<sup>41</sup>

The buyers can, through different ways harm the economy and perform such anti-competitive practices, as not yet restricted by the present laws. In several cases in EU<sup>42</sup> and USA<sup>43</sup>, such instances have occurred and

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<sup>39</sup> Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).

<sup>40</sup> Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WILLIAM & MARY BUS. L. REV., (Oct. 23, 2018): 2:00 am), <https://pdfs.semanticscholar.org/d28a/a317f5ce9ca49768a1ce6916f02935674f70.pdf>.

<sup>41</sup> Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).

<sup>42</sup> Dobson, P.W., Clarke, R., Davies, S. et al. *Journal of Industry, Competition and Trade* (2001) 1: 247. <https://doi.org/10.1023/A:1015268420311>.

<sup>43</sup> Michael C. Naughton, *Buyer Power Under Attack: Recent Trends In Monopsony Cases*, *Antitrust*, Summer 2004, at 81; Scott Kilman, *Tyson Loses Cattle-Price Lawsuit*, WALL ST. J., Feb. 18, 2004; *Clarett v. NFL*, 369 F-3d 124 (2d Cir. 2004).

even also in India, several investors and market service providers are facing such difficulties.<sup>44</sup> The buyers can also make such arrangements between them during an auction to not bid against each other or to bid at the same price for a fixed quantity.<sup>45</sup> This is a concept called “bidding ring”. Such a practice will defeat the very purpose of an auction or bid process and is harmful for the economy. Apart from this, a buying group can also enter into any agreement for the purpose of establishing monopsony in a market.<sup>46</sup>

For the purpose of examining, it is pertinent to note that such cartels are recognized and included in the anti-competitive practices and are prescribed by law in foreign countries. Competition Law has evolved and adopted from the concept of antitrust law as given under the Sherman Act, 1890. It was the first law talking about the concept of anti-competitive practices, and firstly this concept of buyers’ cartel was questioned and de-emphasized.<sup>47</sup> It was later realized that such cartels exist and there is a need to curb such cartels. The Sherman Act strictly prohibits such type of cartels, either formed by buyers’ or sellers’. Blair and Harison (1993)<sup>48</sup> also deal with such issues of monopsony and buyers’ power and how these

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<sup>44</sup> United States v. Romer, 148 F.3d 359; Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292.

<sup>45</sup> Knevelbaard Dairies v. Kraft Foods Inc., 232 F.3d 979 (9th Cir. 2000); *see supra* note 11.

<sup>46</sup> Lee McGowan, Buyer Power and Competition in European Food Retailing, (Edward Elgar Publishing, 2002)

<sup>47</sup> Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 828-44 (2000); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 *Iowa L. REV.* 1137, 1144-45 (2001): “In section 1 of the Sherman Act, on sellers were restricted to enter into such cartels.

<sup>48</sup> *Id.*

can be curtailed and seeks to address such issue in economy theory.<sup>49</sup> This buyer's power has given rise to such law relating to buyers' cartel in European Union and Japanese laws<sup>50</sup> and several other countries.

As it has been rightly said, "Every coin has two faces". Likewise, there are two faces of any market economy<sup>51</sup>, one side there are market service providers, who includes sellers distributors, producers, traders, or any other person who contributes in the supply chain of the market. On the other side, there are those who avail such services like buyers or consumers. The legislation has focused on the first part, to protect investors and service providers and on the second part to protect the consumers, but only in restricted way. One aspect was taken into consideration but the other way of thinking is still in question.<sup>52</sup>

The need for having such regulations which can restrict such abuse of buyer power is of much significance. Buyers includes any person who buy or purchase the product.<sup>53</sup> The use of that product is not relevant. Therefore, such buyers includes the classes of consumers, the traders or distributors or any other person who purchases goods, and the use of that good either for commercial purpose or for personal use is irrelevant. A perfect example is of U.S., Walmart which is the largest company in the

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<sup>49</sup> 10 Roger Clarke, *Buyer Power and Competition in European Food Retailing*, 24 (2002).

<sup>50</sup> Mel Marquis & Shingo Seryo, *The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation*, COMPETITION POLICY INTERNATIONAL (2014).

<sup>51</sup> Thomas A. Piraino Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, HASTINGS LAW JOURNAL (2005)

<sup>52</sup> Chloé Binet, *Buyer Power in EU Competition Law*, Université Catholique de Louvain Fonds de la Recherche Scientifique - FNRS, (2014 )

<sup>53</sup> Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(f).

world with 8.5% of the retailers<sup>54</sup> faced such a situation. It was alleged that these retailers formed a buyers' cartel and tried to eliminate other buyers from the market. They colluded and formed an agreement only regarding the purchase of goods from the Walmart.<sup>55</sup> The agreement was for purchase and not for sale, and therefore it was considered a buyers' cartel. Although Walmart benefitted in one way by this cartel<sup>56</sup> but other retailers in the competition faced many hindrances and were eliminated from competition because of this cartel.<sup>57</sup> Apart from this, other behaviour of buyers can harm competition and establish monopsony in the market.

However, it is not necessary that agreements between buyers are always harmful. They can be made for the economic benefit of the firm or the society.<sup>58</sup> Thus, the concept has to be made clear between such agreements as entered by the buyers' for economic growth and such agreements made for the purpose of cartel, which have appreciable adverse effect on competition. Such agreements which are not injurious to the competition within India are known as "buying group". There is a thin

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<sup>54</sup> Ann Zimmerman, *Wal-Mart Loses Discount Edge in Sluggish Early Holiday Sales*, WALL ST. J., (Nov. 30, 2004).

<sup>55</sup> Steve Lohr, *Is Wal-Mart Good for America?*, N.Y. TIMES, Dec. 7, 2003; John R. Wilke, *Bully Buyers: How Driving Prices Lower Can Violate Antitrust Statutes*, WALL ST. J., Jan. 27, 2004.

<sup>56</sup> William J. Holstein, *First Corporate Scandals, Then Tough Competition*, N.Y. TIMES, Nov. 7, 2004, at BU9.

<sup>57</sup> Wal-Mart Tops Fortune 500 List, CHATTANOOGA TIMES FREE PRESS, Mar. 23, 2004, at C2. In 2004.

<sup>58</sup> Robert Pitofsky, *Entering the 21<sup>st</sup> Century: Competition Policy in the World of B2b Electronic Marketplaces*, Executive Summary, (October 23, 2018, 3:00 am), [https://www.ftc.gov/sites/default/files/documents/reports/entering-21st-century-competition-policy-world-b2b-electronic-marketplaces/b2breport\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/entering-21st-century-competition-policy-world-b2b-electronic-marketplaces/b2breport_0.pdf).

line gap between “Buying Group” and “Buyers’ Cartel”.<sup>59</sup> Thus, if a group of bidders collude at an auction, and make an agreement to negotiate the prices for the inputs they seek, even if they will use and bill the products separately.<sup>60</sup> Such kinds of agreement or collusion is valid in the eyes of law. However, other types of collusion which has appreciable adverse effect on the competition are restricted and are known as buyers’ cartel.

#### 4. RECOGNITION OF BUYERS’ CARTEL UNDER COMPETITION LAW IN INDIA

For instance, one such cartel was recognized in the MRTP Act, where the legislation restricted such kinds of anti-competitive practices by the buyers. Before Act came into force, in the Case of *Haridas Exports v. All India Float Glass Manufacturers’ Ass’n*,<sup>61</sup> the court discussed this matter and decided the ambit of Section 33(1) (d) of MRTP<sup>62</sup> and held that this section implies two categories of agreements. The first is of the buyers’ cartel, where buyers collectively form an agreement to purchase or tender goods and services and the second one is sellers’ cartel, where sellers’ collectively participate in the formation of the such anti-competitive agreement for the purpose of sale. That section does not talk about an agreement of buyer’s cartel and seller’s cartel.<sup>63</sup>

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<sup>59</sup> Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & M. L. REV. 65, 142-43 (2002);

<sup>60</sup> David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High Technology Industries*, 43 ANTITRUST BULL. 801, 809 (1998).

<sup>61</sup> *Haridas Exports v. All India Float Glass Manufacturers’ Assn.*, 2006 SCC 600.

<sup>62</sup> Monopolistic Restrictive and Trade Practices Act, 1969, Act No. 53, Acts of Parliament, § 33(1)(d).

<sup>63</sup> Mel Marquis & Shingo Seryo, *supra* note 50.

The concept of monopsony or buyer's power to control the economy has been recently discovered by the courts. As the Commission or the courts have recently interpreted these sections in reference to the buyers' cartel, it is important for them to look for some strict restrictions which can be imposed on buyers.<sup>64</sup> The need to have such cartels is crucial, as discussed above, and it should also be recognized under Competition Law of India.<sup>65</sup>

## **5. INSTANCES WHERE BUYERS' CARTEL IS RESTRICTED BY THE COMPETITION COMMISSION OF INDIA**

The Competition Commission of India proved itself to be an effective and efficient regulator. The need to consider buyers' cartel as an anti-competitive practice is recognized by the Competition Commission of India which can also be seen in the cases discussed below.<sup>66</sup> However, the author is of the view that these judgments are still not sufficient to interpret such cartels and restricts them under the Act. The author has criticized the view of the Supreme Court in the recent judgements relating to buyers' cartel. In the recent case of *Rajasthan Cylinders & Containers Limited v. Union of India*,<sup>67</sup> the Supreme Court defined the concept of monopsony.<sup>68</sup> The court recognized that such kinds of market where the

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<sup>64</sup> "Transcript of The VIII NLSIR Symposium On Competition Law." in National Law School of India Review, vol. 27, no. 2, pp. 5-6 (2015).

<sup>65</sup> Dobson, *supra* note 42; Michael C. Naughton *supra* note 43.

<sup>66</sup> Sunipun, *Development of Competition Law in India*, IPLEADERS (October 5, 2018 5:00 pm), <https://blog.ipleaders.in/competition-law-india/>.

<sup>67</sup> *Rajasthan Cylinders and Containers Limited v. Union of India*, 2018 SCC OnLine SC 1718.

<sup>68</sup> GEORGE STIGLER, THE THEORY OF PRICE 216-18 (1987).

power is vested with buyers can lead to adverse effect on the economy. The court pointed out that there was a monopsony/oligopsony market, where there were three buyers who were vested with all the powers. The Apex Court mentioned that in such kinds of markets the probability of having collusions and anti-competitive agreement is very less because the competition does not exist. The need to restrict such cartels was not looked into. In fact, monopsony/ oligopsony market is one of those markets in which the possibility of infringement of anti-competitive policies can take place.<sup>69</sup> Such markets have received meagre attention all over the world for the sole reason that these markets does not harm the competition in the market<sup>70</sup> but they ignore the fact that this market can be equally harmful.<sup>71</sup> In the above case cited, the court though considered that such kinds of markets do exist, but neither did they interpret that cartel to be restrictive under Section 3 of the Act, nor did they recognize the need for stringent laws for such cartels. The interpretation of the court is limited to the justification that such markets are less harmful for competition policies making them ignorant that there is the high possibility for such cartels to take place.<sup>72</sup>

Another recent Supreme Court judgment interpreted buyer's cartel, and restricted such cartels under section 3(3) of the Act. Although this interpretation is still in question. In the recent judgement of *XYZ v. Indian*

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<sup>69</sup> Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991), <http://scholarship.law.cornell.edu/clr/vol76/iss2/1>.

<sup>70</sup> HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW*, 17-18, (Hornbook Series Lawyer's Ed., 1985).

<sup>71</sup> *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984).

<sup>72</sup> *Balmoral Cinema v. Allied Artists Pictures*, 885 F.2d 313 (6th Cir. 1989).

*Oil Corporation Ltd.*<sup>73</sup>, the court interpreted that the term “buyers’ cartel” and included and restricted it under Section 3 of the Act. It was held that the provision says that “No enterprises or persons shall enter into any agreement related to production, supply, distribution, storage, **acquisition**, or control of goods and services in India.” The court emphasized on the term ‘acquisition’ and concluded that if Section 3(1) read with Section 3(3)(a) which talks about the prix fixation of purchase prices, then it would include the restrictions on buyers cartel.

Making reference to *Coordination committee* case<sup>74</sup> will be of much relevance, the court held that the enterprise and person should indulge in some “economic activity” as described in the Act and those activities must be related to offering of products. The main loophole here is that the consumers<sup>75</sup>, as per coordination committee case does not come under the purview of Section 3 but the judgement given in XYZ’s case depicts a different picture. One more point was highlighted by the court that the buyers’ cartel cannot be treated at par with sellers’ cartel.

Just as sellers can form a market power and disrupt the economy, buyers can also do the same. For every seller, there is a buyer therefore, sellers’ cartel and buyers’ cartel must be treated at par, the theories of harm must be considered in analysing the same. The buyers have equal opportunity to form anti-competitive agreements. Many Indian as well as foreign examples through above cited cases and reasons can show the importance to have equal restrictions on such cartels.

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<sup>73</sup> XYZ v. Indian Oil Corporation Ltd., 2018 SCC OnLine CCI 55.

<sup>74</sup> Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal and others, (2017) 5 SCC 17.

<sup>75</sup> *Id.*



But the question of whether the activity of “purchasing” is covered under the ambit of economic activity, thus, covering buyers’ cartel under the said Section remains unanswered. This is still ambiguous and not clearly interpreted by the court itself. Though they recognized that such cartels may exist but there still remain loopholes and questions on to whether the provision “actually” includes buyers’ cartel or whether the purchasing activity can be covered under economic activity, moreover, whether consumers can also equally be held liable under this section of the Act if they violate or indulge in any anti-competitive practices under the Act.

## **6. ASSESSMENT OF DIFFERENT JURISDICTIONS ON BUYERS’ CARTEL**

In the contemporary times, the law has been under pressure to adapt as per the changing circumstances of the world. The law must adapt as per the changes in social and economic habitat and modify itself for being just and equitable for each sector of the society. The new and alternate need of models can be easily construed from the laws of foreign jurisdictions. Comparison with other jurisdiction presents a kind of idea that may not be found in legal history or jurisprudence.<sup>76</sup>

During the 1890 debates in both the houses of the US the congress raised concerns regarding the excessive power of buyers or sellers against

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<sup>76</sup>Ault, Hugh J., & Mary Ann Glendon, “*The Importance Of Comparative Law In Legal Education: United States Goals And Methods Of Legal Comparison*” 27 JOURNAL OF LEGAL EDUCATION 4, 599, 599–608 (1976).

sides of the market.<sup>77</sup> This resulted in the enactment of the Sherman Act which is “aimed at preserving free and unfettered competition as the rule of trade.”<sup>78</sup> As per the Sherman Act, the buyers’ cartel are illegal *per se* and are liable to be criminally prosecuted. Any agreement between buyers which creates market power on the buying side of the market,<sup>79</sup> the Sherman Act treats buyers cartels same as it treats seller cartels.<sup>80</sup> The rule of interpreting cartels *per se* illegal came from judicial decisions.<sup>81</sup> The US Supreme Court in 1948 has dealt with the issue of price fixing by the buyers.<sup>82</sup> It is said in the US that all such activity of entering into agreements and making cartels is “threat to the central nervous system of the economy.”<sup>83</sup>

In the case of *United States v. Adobe Systems*, five companies having place of effective management in the US, entered into an agreement to not to ‘cold call’ employees of each other firms.<sup>84</sup> Through this, the five major companies formed a cartel due to which the ability of employees to get better job opportunities significantly decreased as there was not much competition left between employers to attract the most

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<sup>77</sup> Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 ANTITRUST BULLETIN 369 (1993).

<sup>78</sup> *National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n. 27 (1984).

<sup>79</sup> Competition Committee, *Roundtable on Monopsony and Buyer Power*, Directorate for financial and enterprise affairs, <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf>.

<sup>80</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

<sup>81</sup> *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 331 (1897).

<sup>82</sup> *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

<sup>83</sup> *United States v. Socony-Vacuum Oil Co.* 310 US 150, 226 n.59 (1940).

<sup>84</sup> *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.C.C. Sept. 24, 2010), ECF No. 1, Complaint 2, at 2.

valuable talent.<sup>85</sup> Therefore, Judge Lucy Koh of the Northern District of California approved a \$415 million settlement in March 2015.<sup>86</sup>

European Directive says that:

*Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.*<sup>87</sup>

*The European law says that any form of cartel reduces revenue and is hence illegal per se. Recital 43 of the Directive qualifies the lower price paid by the buying cartel as actual loss, that is the harm to the supplier corresponding to the difference between the competitive price and the price actually paid by the cartelists.*<sup>88</sup>

For example, EU's Competition watchdog found that three companies who were acting as buyers formed a cartel and were reducing

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<sup>85</sup> United States v. Adobe Sys., Inc., No. 1:10-cv-01629 (D.C.C. Mar. 18, 2011), ECF No. 17, Final Judgment § 4.

<sup>86</sup> Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement with Defendants Adobe Sys., Inc., Apple, Inc., Google Inc., and Intel Corp., Approving Form and Manner of Notice, and Scheduling Final Approval Hearing, In re High-Tech Emp. Antitrust Litig., No. 1:11-cv-02509 (N.D. Cal. Mar. 3, 2015), ECF No. 1054.

<sup>87</sup> Directive 2014/104/EU of the European Parliament and of the Council (26 November 2014), art. 2 (20).

<sup>88</sup> <https://core.ac.uk/download/pdf/46117303.pdf>.

the purchase price of the scrap lead acid automotive batteries intentionally. The companies eventually had to pay 67 Million Euros.<sup>89</sup>

## 7. CONCLUSION

The authors explain the current situation of Competition law in India, the significance of cartels and how their formation may adversely affect the economic structure of the country. It is suggested through this paper that Act must not limit the interpretation of ‘Cartels’ to sellers but also to ‘buyers’. The author proposes the interpretation of Competition law through various case laws and other authorities.

The economists are trying to understand the factors that may change the buying pattern of a certain product in the market. The countervailing buying power is also a certain factor that may affect the buying pattern of a particular good, directly or indirectly. Therefore, in a welfare state it is suggested that naked restraints put by the buyers must be per se illegal. On the other hand, the formation buyer cartels provide a transactional efficiency in the market, which in turn helps smaller buyers to develop their business. Therefore, Competition law must develop in a manner where it lays down a set of guidelines to form cartels so that the parties can avoid the use of the cartels in a way that adversely effects competition. The opinion that the buyers’ cartel help consumers is simply an incorrect proposition.

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<sup>89</sup> Malina McLennan, *DG Comp fines battery recycling buyers' cartel*, Global Competition, (October 24, 2018: 3:00 am), <https://globalcompetitionreview.com/article/1081052/dg-comp-fines-battery-recycling-buyers-cartel>.