



**KHAITAN
&CO**
Advocates since 1911

BREAKING CARTELS IN INDIA

MANAS KUMAR CHAUDHURI, PARTNER

6 November 2018, UCL London

Bengaluru Kolkata Mumbai New Delhi



OVERVIEW OF THE LAW

- Neither per se illegal nor a criminal act
- Rebuttable presumption
- Easy to complain – low filing fee
- An order of the Commission is ensured per law
- Pecuniary penal consequences only
- Individual liabilities – high risk/reputational loss
- Economic evidences qua documentary evidences
- JVs vs other horizontal agreements
- Export agreement vs effects doctrine
- Leniency vs Whistle Blower
- Dawn Raids and challenges
- Overlap amongst Regulators and harmonisation

Copyright © Khaitan & Co 2018 | 2



BREAKING CARTELS

- **Filing by parties aggrieved [Section 19]**
 - Based on merits, an Order is ensured
 - Whistle Blower's personal grievances
 - Investigation by DG
 - Defences available to respondents
 - Mitigation from penal consequences
 - Final Orders appealable
- **Voluntary disclosure by conspirators [Section 46]**
 - Procedure is different despite basic similarities
 - Defending becomes too difficult
 - If Dawn Raid ordered – after first Applicant moved in
 - Subsequent Applicants – period of Limitation
 - Amendments of 8 August 2017
- **Concepts**
 - Broader definition of "agreement"
 - Information sharing
 - "hub & spoke" cartels possible
 - Market analysis possible
 - AAEC test
 - Suo Motu powers of the CCI
 - Follow-on action legally possible (LP Cases vulnerable)

Copyright © Khaitan & Co 2018 | 3



DECISIONAL PRACTICE

Cases proved

- Cement (Trade Association vs Cement Companies)
- Ethanol Blending (Industrial customers vs Sugar Mills)
- Excel Corp (*SOE vs private parties*)
- SOE Insurance (State of Kerala vs SOE Insurance)
- Fuel Surcharge – Aviation (Trade Association vs five Airlines)

Cases not proved

- Steel (Trade Association vs major steel producers)
- Tyre (*1st round*) (Trade Association vs major tyre producers)
- Asbestos (Individual vs Asbestos manufacturers)
- Real Estate (Individual vs Major Real Estates developers)
- LPG Cylinder (Suo Motu Case against LPG Cylinders)

Leniency Cases

- Brushless DC Fans
- Zinc Dry Cell [*Two cases*]
- Pune Municipality

Copyright © Khaitan & Co 2018 | 4



SAFE HARBOUR?

- **Extremely difficult**
 - Leniency followed by successful Dawn Raid cases – most difficult
 - Mitigation of penalties possible
 - Cross-border cases proved overseas involving Indian Subs
- **Difficult**
 - Non-Leniency cases yet better than above
 - Genuine and robust compliance culture – may mitigate penalties
- **Trade Association**
 - Industry issues
 - Information exchange of non-commercial sensitivities
- **Other examples**
 - Sovereign function of the State, but cautious examination is essential
 - SOE Oil Marketing Companies – not too safe: 3 Companies comprise 99% market share
 - Single Economic Entity – proof is essential
 - JV – only if it is economic enhancing
- **Appeal**
 - Specialized Appellate Tribunal
 - Writ jurisdictions of the Constitutional High Courts

Copyright © Khaitan & Co 2018 | 5



THANK
YOU

www.khaitanco.com

Khaitan & Co asserts its copyright as the author of this presentation.

The contents of this presentation are for informational purposes only. Khaitan & Co disclaims all liability to any person for any loss or damage caused by reliance on any part of this presentation.