Finding the Hub and the Spoke of Cartels: Mapping the Indian Experience

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Abstract

As per the Competition Act 2002 (hereinafter called the Act), cartel is defined in terms of an agreement amongst competitors, operating at the same level of a commercial activity. Such horizontal agreements leading to anti-competitive practices are proscribed under the Act. The Act does not deal with the hub and the spoke of a cartel as there was a lack of urgency vis-à-vis such cartels. It has only been in the recent past, that the Competition Commission of India (hereinafter called the CCI) took note of hub and spoke cartels in the Indian market. Consequently, the Competition Law Review Committee (hereinafter called CLRC) in its Report of July 2019 has made recommendations pertaining to hub and spoke cartels. As a consequence, the 2023 Amendment to the Act has incorporated provision pertaining to hub and spoke cartels. The present article maps the Indian experience on the hub and spoke cartels. The primary argument of the author is that the legislative framework within the Act is inadequate to deal with hub and spoke cartels. Hence a comprehensive re-vision is needed.

Key Words: Cartel, Hub and Spoke, Competition Act, CLRC, Market, Amendment, CCI

I. Introduction

As per the Competition Act 2002 (hereinafter called the Act), cartel is defined in terms of an agreement amongst competitors, operating at the same level of a commercial activity.[2] Such horizontal agreements leading to anti-competitive practices are proscribed under the Act.[3] Against this backdrop, investigating and

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[2] The Competition Act 2002 (The Act) s 2 (c)

[3] *Ibid* [(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.]

prosecuting hub and spoke cartels is a challenge due to its peculiarity. The Act does not deal with the hub and the spoke of a cartel as there was a lack of urgency vis-à-vis such cartels. It has only been in the recent past, that the Competition Commission of India (hereinafter called the CCI) took note of hub and spoke cartels in the Indian market. Consequently, the Competition Law Review Committee (hereinafter called CLRC) in its Report of July 2019 has made recommendations pertaining to hub and spoke cartels. As a consequence, the 2023 Amendment to the Act has incorporated provision pertaining to hub and spoke cartels.[4] The present article maps the Indian experience on the hub and spoke cartels. The primary argument of the author is that the legislative framework within the Act is inadequate to deal with hub and spoke cartels. Hence a comprehensive re-vision is needed.

II. Hub and Spoke Vs Cartels: It's different!

Hub and spoke is different from ordinary cartels. In this brand of cartels, the coordination is not between firms that ought to be competing. On the other hand, apart from coordinating amongst themselves, these firms also coordinate with a firm "that resides either upstream or downstream from them."[5]. For example, say A, B, C and D are sellers of semi-conductor and E is the manufacturer of the product. Herein E can enter into a price fixing arrangement with any one of the players viz. A, B, C or D. Subsequently E can convince B that since A, C and D have agreed to fix the price, B should do so. This convincing will lead to each of the sellers colluding with E to fix the price. The implicit coordination in the conduct of the sellers amongst themselves as well as with the manufacturer is a classic example of hub and spoke. The proof of coordination is called the rim of the spokes. The hub is E and the spokes are different sellers. The incentives in this arrangement are the same, as in any other ordinary cartel. However, it is structurally different for an ordinary cartel.

The origins of the metaphor hub and spoke can be traced to a judgment of the US Supreme Court in a loan fraud case.[6] While assessing the nature of the conspiracy

[4] THE COMPETITION (AMENDMENT) ACT, 2023 [The Competition (Amendment) Act, 2023 has been published in the Gazettee of India on 11th April, 2023]
[5] Luke Garrod, Joseph E. Harrington, Jr.& Mathew Olczak, *Hub and Spoke Cartels- Why They Form, How They Operate, And How To Prosecute Them* (The MIT Press 2021) vii
[6] Kotteakos v. United States, 328 U.S. 750 (1946)

the US Supreme Court noted that the "*the pattern was that of separate spokes meeting at a common centre though ... without the rim of the wheel to enclose the spokes*."[7] The US Supreme Court concluded that since there was absence of the proof of a rim "*each set of loans constituted a separate conspiracy, between the hub and the individual spokes*."[8] As per the Act, cartel is defined as an association of "*producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*".[9] Thus, the proof of cartels is based on anti-competitive practices amongst businesses working at the same level of production or distribution or selling or trading.

There need not be any written proof of such agreements. Circumstantial evidence is enough to establish such anti-competitive agreements.[10] Moreover as per the Act only horizontal anti-competitive agreements are regarded as cartels and are prima facie void. Section 3 (1) of the Act declares that all agreements are regarded as anti-competitive "*which causes or is likely to cause an appreciable adverse effect on competition within India.*"[11] As per Section 3 (3) of the Act agreements/arrangements/decisions by cartels are presumed to have an appreciable adverse effect.[12] Consequently since cartels are presumed to have an

[7] *Ibid* 755
[8] Barak Orbach, *Hub-And-Spoke Conspiracies*, 15-APR Antitrust Source 1, 3(2016)
[9] The Act (n 1) s 2 (c)
[10] Lovely Dasgupta, *Cartel Regulation-India in an International Perspective* (CUP 2014) 216
[11] The Act (n 1) [Anti-competitive agreements 3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.]
[12] *Ibid* [(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of service…shall be presumed to have an appreciable adverse effect on competition]

appreciable adverse effect on competition, as per section 3 (2) of the Act, they are per se void.[13].

In contrast to the conceptualisation of cartels, hub and spoke agreements involve both horizontal as well as vertical market players.[14] The focus is on the anti-competitive collusion between these differently situated market players. The rationale of treating such arrangements at par with cartels is to highlight their detrimental effect. The spokes are vertically situated in relation to the hub. However vis-à-vis each other the spokes are all horizontally situated. Further their decision pertaining to market sharing or price fixing *et al* is centralised in the hub. The hub thus facilitates the spokes to share information or collude. Consequently, the spokes don't have to come in contact with each other. They operate via the hub.[15] For instance in the Belgian Hub and Spoke cartels case involving pharmacy, perfumery and hygiene, the hub were the suppliers like Colgate-Palmolive, Beiersdorf, GSK, L'Oreal, Henkel, Procter & Gamble and Unilever.[16] On the other hand the spokes were the major retail chains who colluded with each of the suppliers. The collusion pertained to individual products of the suppliers. Accordingly, the regulators found evidence of the rim or an implicit agreement to fix prices.[17] Thus even though it is structurally different from a traditional cartel, the outcome is same. Consequently, competition law regulators across jurisdictions regard them as cartels.

[13] ibid [(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.]

[14] Jarod Bona, 'Hub-and-Spoke Antitrust Conspiracies and the Classic Case of Toys "R" Us v. FTC' (CPI Blogs -September 7, 2022) < https://www.competitionpolicyinternational.com/hub-and-spoke-antitrust-conspiracies-and-the-classic-case-of-toys-r-us-v-ftc-2/ > accessed 10 January 2023

[15] *Ibid.*

[16] Koen Platteau & Genevieve Borremans, 'Competition Authority settles hub and spoke cartel case' (*Lexology,* 16 June 2015) < https://www.lexology.com/commentary/competition-antitrust/belgium/simmons-simmons/competition-authority-settles-hub-and-spoke-cartel-case > accessed 10 February 2023

[17] *Ibid.*

As per the traditional competition law jurisprudence cartels are treated under *per se void rule*.[18] There is no presumption of pro-competitive effects in the case cartels. Hence it makes sense to treat hub and spoke arrangements as cartels. This ensures that hub and spoke cartels will face the same stringent treatment at par with traditional cartels.

Looking at the hub and spoke cartels through the lenses of the 'Amended' Act: A half-baked Indian experiment:

To begin with, the 2023 Amendment to the Act has not changed the narrative vis-à-vis cartel. Consequently, the narrative vis-à-vis hub and spoke cartel too remains equally problematic. For instance, notwithstanding the 2023 Amendment, the Act continues to define cartels in terms of horizontal agreements.[19] Further the amendment introduced to section 3 of the Act, is cosmetic. As discussed, above, cartels are *per se* void under section 3 of the Act. However, this statement is misleading. For a closer reading of the Act reveals that the Indian law on cartel is completely the opposite of the global trend. This is apparent from the provisions that form the core of the anti-cartel law in India. The first relevant provision which needs to be looked into is section 3 (1) of the Act. The emphasis is on the words '*appreciable adverse effect on competition within India*' in this part. Hence a cartel will be disallowed only if it has an appreciable adverse effect on competition. One can challenge this assertion since in section 3(3) it is clearly stated that cartels '*shall be presumed to have an appreciable adverse effect on competition*'. However, this presumption is rebuttable and the same is deduced from the usage of the word 'shall be presumed' in the said section.[20] Section 4 of the Indian Evidence Act 1872[21] defines 'shall presume' as:

[18] Dasgupta (n 9) 49
[19] The Act (n 1) s 2 (c).
[20] The Act (n 1).
[21] The scope of the applicability of the Indian Evidence Act, 1872 to the Competition Act, has been explained and detailed out by the CCI, via sub-regulation 2 and 3 of Regulation 41 of the the Competition Commission of India (General) Regulations, 2009.

> "*Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved*."[22]

This section embodies the principle of rebuttable presumption and the Indian courts have reiterated the same. For instance in the *Sodhi Transport Co* case,[23] the Supreme Court, explaining the concept of '*shall presume'*, declared that

> *"[t]he words 'shall presume' require the court to draw a presumption…unless the fact is disproved. They contain a rule of rebuttable presumption. These words i.e. 'shall presume' are being used in Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used…*"[24]

This statement unambiguously establishes that under the Act cartels are only presumed to have an adverse effect on competition. Hence, if a cartel can establish that it does not have any appreciable adverse effect on competition, it will be allowed. This is contrary to the jurisprudence that has developed in the leading jurisdictions on competition law. Neither Canada, nor USA or EU has given any room of manoeuvring to the cartels. They are primarily regarded as *per se void.* For instance, in *Socony –Vacuum Oil Co.* case, Justice Douglas, declared that

> "*…this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful per se (emphasis applied) under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements are designed to eliminate or alleviate may be interposed as a defense*."[25]

In sharp contrast to this line of reasoning, the Act, as it stands, provides ample opportunity for the cartels to rebut the presumption of section 3 (3). And the same

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[22] The Indian Evidence Act, 1872, Section 4. "May presume".—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. "Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. "Conclusive proof".—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[23] Sodhi Transport Co. v State of U.P., AIR 1986 SC 1099; (1986) 2 SCC 486.

[24] *Ibid* 495 para 12.

[25] Socony-Vaccum Oil Co., Inc., et al v. United States, 310 US 150, 60 S. Ct. 811.

is to be found under section 19 (3) of the Act. As per the section 19 (3), the CCI, has to rely on the factors presented therein, while assessing cartels for appreciable adverse effect. There are six factors listed in section 19 (3) of which, post the 2023 Amendment to the Act, three and a half, are negative and two and a half are positive outcomes of an anti-competitive agreement. Further the CCI is given the discretion of either considering all or any one of the enumerated factors while deciding the question of appreciable adverse effect. This is evident from the words "the Commission shall have…due regard to all or any of the following factors" as used in section 19 (3). From the perspective of the cartel there is thus a huge space within which it can play around and defend its position. Accordingly a cartel can defend itself by showing a) that the said agreement does not create barriers to new entrants in the market or b) that the said agreement does not drive existing competitors out of the market or c) that the said agreement does not foreclose competition or d) that the said agreement accrues benefit to the consumers or e) that the said agreement leads to improvements in production or distribution of goods or provision of services or f) that the said agreement leads to promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.[26]

This reading of the Act leads to a clear conclusion that for hub and spoke cartels also, the same escape route is available. They too, like ordinary cartels, can use the defences available under section 19 (3) of the Act. Further the CCI can apply its discretion to accordingly let off a hub and spoke cartel. Thus, the reading of the Act, as explained above, clearly does not indicate that hub and spoke are to be treated as *per se void.* One can argue that the word '*or*' used in section 19 (3) need not be read as disjunctively. However, it still leaves room for ambiguity since the CCI is given the choice to consider any of the defences available under section 19 (3) of the Act. The long title of the Act, also does not resolve the ambiguity. It reads as:

> "*An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried*

[26] Dasgupta (n 9) 178.

on by other participants in markets, in India, and for matters connected therewith or incidental thereto."[27]

This long title indicates the objective of the Act and spells out the reasons for enactment viz. to promote competition, to protect consumer interests and to ensure that all anti-competitive practices are prevented. In the light of the same if section 3 (1) is read along with section 3(2), one can conclude that all agreements are to be prohibited '*which causes or is likely to cause an appreciable adverse effect on competition in India*' and thus void. And consequently, cartels of all kind including hub and spoke cartels are *per se void.* However, this reading of the Act and the anti-cartel provisions does not portray the complete picture. As per section 18 of the Act, the CCI's duty to '*protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*' is *'[s]ubject to the provisions of this Act.*' And the 'provisions of this Act' includes section 19 (3). As explained above, section 19 (3) has to be read along with section 3. Thus, interpretation and application of section 3 (1) to section 3(3) is subject to CCI's discretion as per section 19 (3). And that takes us back to the argument stated above that cartels including hub and spokes are not *per se void* under the Act.[28] Herein it is important to emphasise that the 2023 Amendment to the Act has not changed the main text of either section 18 or section 3. In so far as section 18 is concerned, a proviso has been added which does not impact the interpretation of the said section, as discussed hereinabove. Hence the inference that has been deduced above from the reading together of section 3, section 18 and section 19, continues to hold notwithstanding the 2023 Amendment to the Act.

Further till date no guidelines or regulations on cartels have been issued which will help clarify CCI's stance vis-à-vis section 19 (3). The ambiguity pertaining to cartels is bound to affect India's ability to deal with hub and spoke cartels.

[27] The Act (n 1).

[28] The Act (n 2) [Section 18: Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.]

Further the issues vis-à-vis hub and spoke cartels are more complicated in the light of the provisions of the Act. As already explained the hub and spoke cartels involves a facilitator (the hub) who "*organizes collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints."*[29] This understanding of hub and spoke cartel does not fit in with the definition of cartel as given in section 2 (c) of the Act. As explained above, the Act gives a very traditional understanding of cartel which includes only horizontal agreements. Hence unlike the situation in Canada USA or EU, under the Act it will be next to impossible to treat hub and spoke arrangements as cartels. On the other hand, like South Africa, in India the hub and spoke arrangement will be covered under section 3 (4) of the Act. For the same refers to "*[a]ny other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons at different stages or levels of the production chain in different markets*…".[30] In case of a hub and spoke cartel, the undertakings are at different levels and stages of the production chain and in different markets. Even the addition of the proviso to section 3 (3), through the 2023 Amendment, will not led to a different outcome.

As per the said proviso "*an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part*"[31] of section 3(3) agreements, "*if it participates or intends to participate in the furtherance of such agreement*".[32] This proviso merely widens the ambit of section 3 (3) so as to include hub and spoke arrangements. It however does not impact the interpretational scheme of the Act viz. that cartels including hub and spoke are not *per se* void. For the 2023 Amendment to the Act has not brough about any theoretical changes to impact its interpretation vis-à-vis cartels. As pointe above, even the definition of cartel is retained without any amendment. Arguably thus, unlike the South African scenario, it makes no difference whether hub and spoke arrangement is treated as vertical restraint or cartel.

[29] Barak Orbach (n 6).
[30] The Act (n 1).
[31] The 2023 Amendment (n 3)
[32] *Ibid.*

Since, as explained above, all the anti-competitive agreements under section 3 are subject to the defences available under section 19 (3) of the Act. In the context of the South African Competition Act, both cartel as well as vertical agreements pertaining to resale price maintenance is prohibited.[33] In the Indian context both cartels as well as vertical agreements are presumed to be void. And the presumption is rebuttable. Thus, it really makes no difference whether we in India treat the hub and spoke arrangements as cartels or as vertical arrangements to fix resale price.

Nonetheless, the proviso to section 27 (b) gives an indication that within the Act, cartels are treated differently. As per the said proviso:

> "*in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.*"[34]

However, since this proviso deals with imposition of penalty, it does not help in terms of prosecuting cartels. For, as argued above, cartels including hub and spoke have the benefit of section 19 (3). The proviso only highlight that the cartels are problematic and that means even hub and spoke cartels, too will be amenable to the penalty provision.[35] The imposition of the penalty clearly reflects that cartels have detrimental effect on market and the same is also true for hub and spoke cartels. As discussed unlike any other anti-competitive agreements, cartels by nature are secretive. Hence detection of the same is further backed up by stringent penalty measures. For the stringency of the penalty is used to deter formation of cartels.[36] The hub and spoke arrangements, as discussed above, also have same features and hence are included in section 3 (3) of the Act. The detrimental effect

[33] DAF/COMP/WD(2019)93 (n 75)
[34] The Act (n 1)
[35] Dasgupta (n 9) 195-196
[36] OECD Reports, 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002' <https://www.oecd.org/competition/cartels/1841891.pdf> accessed 12 February 2023

of cartel is also established through section 46 of the Act.[37] As per the section CCI has the authority to impose lesser penalty on the member of a cartel cooperating with the authorities. The cooperation has to be substantial and the member needs to disclose vital information enabling the regulator to detect cartel.

[37] The Act [46. (1) The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, than leviable under this Act or the rules or the regulations made under this Act: Provided that lesser penalty shall not be imposed by the Commission in cases
where the report of investigation directed under section 26 has been received before making of such disclosure: Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section: Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission: Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, —
(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or (b) had given false evidence; or (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the contravention with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed. (2) The Commission may allow a producer, seller, distributor, trader or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and within such time as may be specified by regulations. (3) Notwithstanding anything contained in sub-section (2), the Director General and the Commission shall be entitled to use for the purposes of this Act, any evidence submitted by a producer, seller, distributor, trader or service provider in its application for lesser penalty, except its admission. (4) Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form a prima facie opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations…]

The said provision has been backed by CCI's Lesser Penalty Regulation 2009.[38] These two provisions viz section 27 (b) and section 46, read together with the 2009 regulation, makes it clear why inclusion of hub and spoke arrangements within section 3 (3) is justified. Since hub and spoke are equally secretive and difficult to detect, bringing them within the ambit of cartel provisions, is aimed at helping CCI to better investigate and prosecute them. For the same incentive available to the whistle blowers in the context of cartels will be there in case of hub and spoke cartels. Additionally, as noted above, hub and spoke cartels will now be amenable to penalty provision. Unfortunately, the ambiguity surrounding section 19 (3) negates the benefit that these two sections provide to the regulators. Such a negative impact on investigating and prosecuting of hub and spoke cartel is also due to the need to establish '*appreciable adverse effect on competition'*, as per section 3 (1) of the Act.[39]

In contrast to the Act, in the EU jurisprudence, cartels are *per se* regarded as having the object of restricting competition. Accordingly, they are not exempted from the application Article 101 clause 1 of TFEU by the *de minimis notice*.[40] As explained, under the Act however the effect on competition needs to be demonstrated even in case of cartels, as evident from section 3 (1). Notwithstanding the 2023 Amendment to the Act even in the case of hub and spoke cartels this requirement will be equally applicable. For, as explained above, the text of section 3 has not been changed by the 2023 Amendment. And thus the entire proceeding becomes cumbersome. Finally, even if one were to amend the

[38] THE COMPETITION COMMISSION OF INDIA NOTIFICATION, 'The Competition Commission of India (Lesser Penalty) Regulations, 2009' (New Delhi, 13 August 2009) <https://www.cci.gov.in/legal-framwork/regulations/6/0 > accessed 8 January 2023

[39] The Act (n 1)

[40] EUROPEAN COMMISSION, 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01)' [The Court of Justice has also clarified that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition (2). This Notice therefore does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market.] (30 August 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en> accessed 6 January 2023

definition of cartel to include hub and spoke arrangements and resolve the ambiguity surrounding section 19 (3), it will not suffice. For it still does not resolve the problem relating to proving hub and spoke cartels. As seen in the context of Canada, USA and EU, they are still struggling to find the correct approach to prove hub and spoke cartels. Accordingly, CCI has to specify the tests that it will follow to prove hub and spoke cartels. Since, as noted above, cartels under the Act are regarded as having 'restrictions by effect'. Accordingly, the test to prove hub and spoke cartels needs clarification on the part of CCI. In terms of jurisprudence too CCI has not much to offer as will be seen in the next part.

III. Experiencing Hub and Spoke Cartels- The CCI tale

One of the first cases which resembled a hub and spoke cartel was *Jasper lnfotech Private Limited (Snapdeal) v M/s Kaff Appliances (India) Pvt. Ltd.*[41]. The allegation was that Snapdeal was colluding with the distributors of the manufacturer Kaff Kitchen appliances, to sell its goods online without it consent. Kaff objected to not only the sale but also the price at which they were being sold. Snapdeal countered by alleging that Kaff was forcing its distributors to stick to the high price or face consequences. For Kaff threatened to ban online sale of its product. It needs to be noted that Snapdeal is an online market place website where buyer and seller virtually meet to buy or sell. CCI treated it as a case of resale price restriction case under section 3 (4) (e) of the Act.[42]

The other case which again mimicked a hub and spoke arrangement was *Fx Enterprise Solutions India Pvt. Ltd. v Hyundai Motor India Limited*.[43] In the allegations it was stated that

> "*HMIL is responsible for price collusion amongst competitors through a series of "hub - and - spoke" arrangements. Informant-1 has alleged that HMIL perpetuates hub and spokes arrangement, wherein bilateral vertical agreements between supplier and dealers and horizontal agreements*

[41] Case No. 61 of 2014.
[42] Eeshan Mohapatra, 'Hub-and-spoke Cartels' (EPW, 8 January 2022) <https://www.epw.in/journal/2022/2/commentary/hub-and-spoke-cartels.html> accessed 7 January 2023
[43] Case Nos 36 & 82 of 2014.

> *between dealers through the role played by a common supplier, results in price collusion*."[44]

Herein too CCI treated it as case of vertical restraint under section 3 (4) (b), (d) and (e). Though an argument pertaining to hub and spoke arrangements was made, no discussion to that effect took place.[45] The other significant case that raised the concern of hub and spoke arrangements is the case of *Samir Agrawal v ANI Technologies Pvt. Ltd*.[46] (the Uber case). The allegations herein was that

> "*due to algorithmic pricing, riders are not able to negotiate fares with individual drivers for rides matched through App nor drivers are able to offer any discounts. Thus, the algorithm takes away the freedom of the riders and drivers to choose the other side on the basis of price competition and both have to accept the price set by the algorithm*."[47]

It was also pointed out that the drivers who are attached to Ola or Uber were not their employee but "*independent third party service providers*"[48]. Accordingly it was argued by the informant that "*Ola/Uber, act as 'Hub' where 'spokes' (competing drivers) collude on prices.*"[49]

According to the informant

> "*As Ola/Uber and its drivers do not share any agency/employee relationship, they do not function as single economic entity, and as such the cooperation between drivers orchestrated by Ola/Uber results in 'concerted action' under Section 3(3) (a) read with Section 3(1) of the Act*."[50]

Thus the informant tried to prove the existence of a hub and spoke cartels involving the app based companies and the drivers. However CCI did not accept this proposition as it held that

> "*For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first*

[44] *Ibid* para 7.
[45] *Ibid* para 48.
[46] Case no. 37 of 2018.
[47] *Ibid* para 5.
[48] *Ibid.*
[49] Case no. 37 of 2018 (n 77).
[50] *Ibid* para 7.

> *place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers*."[51]

CCI pointed to the fact that there was no evidence of any agreement "*between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators*."[52] In other words CCI highlighted the requirement of the rim that establishes the collusion between the spokes. In the absence of the rim there could not be a collusion established with Uber/Ola as the hub. At the maximum the vertical restraint between Uber and driver, on an individual basis, was visible.

However, CCI rejected allegations of both hub and spoke cartel as well as violation of section 3 (4) of the Act.[53] Though it is important to note that CCI's insistence on proof of rim via "*agreement, understanding or arrangement, demonstrating/indicating meeting of minds*"[54]appear to follow the trend as seen in Canada, USA and EU. However, it's too early to state with certainty as to the direction CCI will take in the case of hub and spoke cartels. In the Uber case the CCI has also failed to explain as in what way hub and spoke cartels can be read into the Act. Accordingly, no clarity was provided as to the applicability of section 3 (3) to hub and spoke scenario. Finally, it did not delve into the mismatch between the definition of cartel and the concept of hub and spoke arrangements. Thus, the Uber case does not further the Indian cause relating to hub and spoke cartels.

As of date the pointers on Indian approach to hub and spoke cartels thus needs to deduced from the CLRC's 2019 report[55] as well as the 52nd Report of the Standing Committee on Finance.[56] CLRC had recommended inclusion of:

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[51] *Ibid* para 15.
[52] *Ibid.*
[53] *Ibid* para 18.
[54] *Ibid.*
[55] Ministry of Corporate Affairs Government of India, 'Report Of Competition Law Review Committee' (New Delhi, 26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf > accessed 7 January 2023
[56]Ministry of Corporate Affairs, 'Fifty-Second Report Standing Committee On Finance (2022-2023) (SEVENTEENTH LOK SABHA) 'THE COMPETITION (AMENDMENT) BILL, 2022'' (New Delhi, 13 December 2022) <

> "*an explanation to Section 3(3) of the Competition Act to expressly cover 'hubs' and impute liability to such hubs based on the existing rebuttable presumption rule as envisaged under Section 3(3) and without any element of 'knowledge' or 'intention'.*"[57]

Accordingly in the Competition Amendment Bill 2022[58] an amendment had been proposed to section 3 (3). Thus, a proviso was proposed to be inserted to section 3 (3) which stated that:

> "*Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it actively participates in the furtherance of such agreement.*"[59]

However, the said recommendation of the CLRC and the said proviso to the Competition Amendment Bill, were debated and discussed by the Standing Committee on Finance. Various stakeholders presented their view. For instance, Federation of Indian Chambers of Commerce & Industry (hereinafter called FICCI) submitted that there should be clarity as to the evidence needed for regarding an arrangement as an hub and spoke cartel. They also submitted that for producers or sellers or retailers or any other "industry player" to be implicated for hub and spoke cartels there has to proof of intent or knowledge or actual participation in such arrangements.[60] On this submission the Ministry of Corporate Affairs observed that presumptions under section 3 (3) of the Act is rebuttable. This substantiates the concerns raised hereinabove as to the treatment of cartels under the Act. As per the Ministry, the trade players can thus rebut any finding of hub and spoke arrangements through evidence to the contrary. The representative of the Associated Chambers of Commerce and Industry of India also raised concern about the nature of evidence to be considered for determining

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https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf> accessed 9 May 2023

[57] Ministry of Corporate Affairs Government of India (n 102), 3.5

[58] Bill No. 185 of 2022, 'THE COMPETITION (AMENDMENT) BILL, 2022' (Lok Sabha, 5 August 2022) <https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20(Amendment)%20Bill,%202022.pdf > accessed 9 January 2022.

[59] *Ibid.*

[60] Ministry of Corporate Affairs (n 103), 3.54.

a hub and spoke arrangements. Further they were not happy with the language of the proviso in the Competition Amendment Bill.[61]

Herein again the Ministry reiterated the fact that presumptions under section 3(3) of the Act is rebuttable. After considering the concerns and submission of all the stakeholders, the Finance Committee noted that

> *"that there is no clarity on the meaning of active participation in the agreement, which could potentially cover: (i) Entities merely providing intermediation services in digital markets, for instance online platforms; and (ii) Consortiums, industry association and trade unions that merely organise meetings without an agenda to share sensitive information*."[62]

Accordingly, it recommended change in the language of the proviso to section 3 (3). The 2023 Amendment Act thus has incorporated the recommendation of the Finance Committee by replacing the words active participation with intent to participate. However, as explained above, this change is cosmetic. It does not address the existing gaps. As noted above, treatment of cartels including hub and spoke has to be assessed on basis of their restraining object and not effect. Further the definition of cartels has to be amended to include arrangements mimicking hub and spoke. The amendment to section 3 (3) is thus a half-baked measure. For it continues to treat cartels at par with other anti-competitive agreements. As explained above, cartels are more detrimental to competition since they are difficult to detect. Hence, they need to be declared *per se void* without exception.

Unfortunately, section 3 (3) does not clearly address this issue. If hub and spoke cartels have to be dealt with effectively then the Act has to have more stringent provision for cartels in general. For hub and spoke cartels evinces the feature of cartels and the detection and investigation have to be across different level of markets. Hence if cartels are treated stringently through the *per se void rule,* then it will add teeth to the Act vis-à-vis cartels in general and hub and spoke cartels in particular. Finally, the CCI has to come up with clear policy statements on the issue of hub and spoke cartels. CCI's role is vital for its approach towards hub and spoke cartels will determine the fate of businesses as well as consumers. The more ambiguous the approach the more vulnerable is the consumers. However, if

[61] *Ibid*, 3.56.
[62] *Ibid*, 3.59.

the CCI decide to treat rimless arrangements as hub and spoke, that will put the business interest in peril. Importantly small enterprise will be burdened with the cost of litigation and may not be able to rebut the presumption of hub and spoke cartel. For instance, a small-scale manufacturer may have vertical arrangements across the board with different suppliers. And the suppliers have no tacit or explicit collusion amongst themselves. In case of any price escalation, on the part of all the suppliers, a rimless prosecution will burden this small-scale manufacturer to rebut the allegations of hub and spoke. This will disincentivize the small business enterprise and lead to market concentration. The same may not be beneficial to the consumer. Hence CCI needs to urgently come up with clear guidelines on the issue. In this regard the Canadian approach is worth looking into. As the guidelines on hub and spoke, issued by the Canadian competition bureau is more detailed and can be a good reference to start with. However, while doing so the interest of both traders as well as consumers needs to be factored in.

IV. Conclusion

The point that the author brings out is that within the Act, the existing provisions on cartels are ambiguous. For at one end there is lack of *per se void* approach towards cartels at the other end there are provisions on penalty and incentives for whistle blowers vis-à-vis cartels. Against this back ground, it will be difficult for the CCI to deal with hub and spoke cartels. The foremost reason for the same is the definition of cartels, as it exists does not cover hub and spoke arrangements. The hub and spoke cartels involve both vertical and horizontal arrangements, across different level of markets. The current definition only covers horizontal agreements. Thus, there is a conceptual impediment. Further the amended section 3, as discussed above, is still be subjected to the rebuttable presumption test, as per section 19 (3). Hence there are two-fold gaps within the Act while dealing with hub and spoke cartels. One is specific to hub and spoke cartels and the other is via-a-vis cartels in general. One at the conceptual level and the other at the level of enforcement. If the hub and spoke cartels are included within the definition of cartels still then there is the problem of section 19 (3). The rebuttable presumption rule vis-à-vis cartels means that hub and spoke arrangements, too can escape the consequences of the law. If the conceptual gap is filled in, and CCI is able to overcome the problem of section 19 (3), only then will there be a chance of prosecuting hub and spoke cartels. Else in its current form, the Act is not adequate

to deal with hub and spoke cartels. Hub and spoke cartels are now part of our competition law jurisprudence. They thus have to be dealt with through clear policy measures and fine tuning of the Act. Lessons from Canada, USA, EU and South Africa prove that its object is no lesser harmful than cartels in general. Hence the first step to effectively deal with hub and spoke cartels is to settle the test to assess an arrangement as hub and spoke. Apart from that the CCI also needs to come up with guidelines on the applicability of section 19 (3) of the Act. Finally, any proposed amendment to the Act ought to segregate the treatment of cartels from other anti-competitive agreements. Only then will the Indian experience on hub and spoke cartels will be at par with the other more mature competition law jurisdictions across the world.