ANTI-COMPETITIVE AGREEMENT: IT'S IMPACT ON CONSUMERS

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An agreement which attempts to control the market (through measures like fixing prices, controlling volumes of production so that prices rise artificially, blocking certain competition law and protection of consumer interest distributors/suppliers, etc.) is an anti-competitive agreement.[1]

Section 3 of the Competition Act 2002 prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. Under Section 3, any such agreement is considered void. Hence, Provision of section 3 (1) casts a duty on enterprises to examine the proposals for agreement or arrangement from its long term effect on competition in the market.

In *Allied Tube Case*[2], the US Supreme Court found that a subgroup of the standard setting organization effectively "captured" the whole group and harmed competition by excluding an innovative product. In this case, an association that published a code of standards for electrical equipment required the use of steel conduit in high-rise buildings, but a new entrant into the market proposed to use plastic conduit. The new product was allegedly cheaper to install, more pliable, and less susceptible to short-circuit, thus benefiting the consumers. The incumbent steel conduit manufacturers agreed to use the association's procedures to exclude the plastic product from the code by sending new members to the association's annual meeting whose sole function was to vote against the new product. As a result, the potential entrant's ability to market the plastic conduit was significantly impaired and consumers were denied the benefit of a potentially significant product innovation.

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between 'horizontal' and 'vertical' agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are

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1 Sanchit Aggarwal, "Competition Law and Protection of Consumer Interest", Retrieved from http://www.cci.gov.in on 25th January, 2013

2 486 U.S. 492 (1988)

those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as *prima facie,* horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser - seller relationship.

HORIZONTAL AGREEMENTS

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. But the market for the product(s) is critical to the question, if the agreement trenches the law. The Act has taken care to define the relevant market.[3] To attract the provision of law, the products must be substitutes. If parties to the agreement are both producers or retailers (or wholesalers) they will be deemed to be at the same stage of the production chain.

A specific goal of competition policy/law is and needs to be the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing enterprises (horizontal agreements) on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes (vertical agreements, for example between a manufacturer and wholesaler) which are likely to harm competition (albeit less harmful than horizontal agreements) need to be addressed in the competition policy/law. The foremost constituent of any competition policy/law is obviously the objective to foster competition and it does observe is the need to deal effectively against practices and conduct that subvert competition. The Act reckons these propositions.

In general the *'rule of reason'* test is required for establishing that an agreement is illegal. However, for certain kinds of agreements, the presumption is generally that they cannot serve any useful or pro–competitive purpose. Because of this presumption, the law makers do not subject such agreements to the "rule of reason" test. They place such agreements in the *per se*

[3] Relevant market is discussed in the section on 'abuse of dominance' under the heading 'Product Market and Geographical Market', infra

illegal category. The Act presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an appreciable adverse effect on competition :

- Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.

- Agreements regarding quantities. These include agreements aimed at limiting or controlling production, supply, markets, technical development, investment or provision of services.

- Agreements regarding bids (collusive bidding or bid rigging). These include tenders submitted as a result of any joint activity or agreement.

- Agreements regarding market sharing. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

Manufacturer 1 → Manufacturer 2 → Manufacturer 3

PER SE ILLEGALITY

Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are *per se* illegal. This provision of *per se* illegality is rooted in the provisions of the US law and has a parallel in most legislation on the subject. The Australian law prohibits price fixing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law, namely, Competition Act, 2000, endorses certain agreements to have an appreciable effect on competition (presumption is however rebuttable). A *per se* illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the “rule of reason" test in the Act.

VERTICAL AGREEMENTS

By and large, as noted earlier, vertical agreements will not be subjected to the rigours of competition law. However, where a vertical agreement has the character of distorting or preventing competition, it will be placed under the surveillance of the law.

For instance, the following types of agreements, *inter alia*, will be subjected to the "rule of reason"[4] test.

- Tie – in arrangement;
- Exclusive supply agreement
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance

The Act lists the following factors to be taken into account for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition, namely,

A. creation of barriers to new entrants in the market,

B. driving existing competitors out of the market,

C. foreclosure of competition by hindering entry into the market,

D. accrual of benefits to consumers,

E. improvements in production or distribution of goods or provision of services, and

F. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Manufacturer

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Dealer

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Consumer

[4] The Legal Environment Today: Business In Its Ethical, Regulatory, E-Commerce By Roger Miller, Frank Cross, P.655

1. *Cartels*

In simple terms a cartel is an association of manufacturers or suppliers that maintain prices at a high level and restrict competition.[5] A hard-core cartel as defined in the OECD recommendation is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[6] In *Haridas Exports* v. *All India Float Glass Manufacturers Association*[7], the Supreme Court said that the mere formation of cartel will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect.

2. *Predatory Pricing*

The "predatory pricing" under the Act means "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors".[8] The predatory firm after driving other competitors from the market raises their price above the competitive levels to earn supra-competitive profits and recoup the losses incurred during the predatory period. This anti-competitive practice undermines the competition in the market and is not in the interest of the consumers.[9]The US Supreme Court in *Utah Pie* v. *Continental Banking Co.* [10] considered the price below the full cost as predatory.

3. *Tying Agreement*

A tying agreement is an agreement by party to sell one product but only on condition that buyer also purchases a different product, or at least agrees that he will not purchase the

[5] Supra note 2

[6] *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation*, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing.

[7] (2002) CTJ 353 (SC) MRTP

[8] See Explanation (b) of Section 4of Competition Act 2002.

[9] Einer Elhauge and Damien Geradin, *Competition Law and economics*, Hart Publishing, pp 314

[10] 386, US 685 (1967)

product from any other supplier.[11] It is not mandatory that the tying and the tied product should be similar in character.[12]

4. *Bid Rigging or Collusive Bidding*

Generally, this is the case with tenders. A scheme in which businesses collude so that a competing business can secure a contract for goods or services at a pre-determined price or where for the sake of appearance several other parties also present a bid and submit offers that they know the buyer will reject because the price is too high or the terms are unacceptable in order to create the appearance of legitimate bidding while ensuring that a prearranged "competitor" will win the bid.[13]

5. *Exclusive Supply Agreement*

The agreements which bound the traders to purchase only from one supplier are also indirectly affecting the consumer interest. Because the supplier can impose unreasonable cost and the trader will levy the same from the consumers.

6. *Exclusive Distribution Agreement*

When the agreement is entered in order to restrict or withhold the supply of goods or allocating the market for supply it can cause scarcity of the good in the market which directly cause a hike in the prices.[14]

7. *Agreements of Refusal to Deal*

When an agreement is entered between the traders refusing to buy or sell any product to a class of sellers or buyers, the consumer are deprived of availability of better goods or services at cheaper prices. As these kinds of agreements directly reduces the options available for the consumer.[15]

8. *Resale Price Maintenance Agreements*

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[11] Abir Roy and Jayant Kumar, *Competition Law in India*, Eastern Law House, Kolkata, 2008, pg 54
[12] In Re, Anand Gas, RTP Enquiry 43/1983
[13] Retrieved from http://www.investopedia.com on 3rd April, 2013
[14] Ibid.
[15] Ibid.

These agreements directly affects the prices to be paid by consumer for the goods or services as the seller is bound to maintain the price of the goods or services as prescribed by the supplier.[16]

9. *Denial of Market Access by Dominant Firm*

The denial of market access refers to denial both for the new players and consumers. If the new players are restricted from entering into one market, the dominant enterprise can use its position for imposing unreasonable restrictions in market. When the consumer is denied to access any relevant market by a dominant firm, it causes him with a lot of trouble. As the consumer has no other option to acquire the goods or avail the services from any other market of same.[17]

THE RULE OF REASON

Under this rule, the effect on competition is to be found on the facts of the case. The rule of reason in examining the legality of restraints on trade was explained by the US Supreme Court in *Board of Trade of City of Chicago* v. *US*[18] as,

"Any restraint is of essence, until it merely regulates and promotes competition. To determine this question, the Court must ordinarily consider the facts peculiar to the business to which restraint is applied, its condition before and after the restrain was imposed, the nature of restrain and its actual or probable effect.[19]"

The applicability of section 19(3) justifies the application of rule of reason in the Indian context, whereby the agreements have to be analyzed against the parameters laid down under Section 19(3).

THE PER SE RULE

There is no concept of per se rule in India and any kind of presumption under Section 3(3) is rebuttable on account of various grounds mentioned under Section 19(3).[20] The per se rule is

[16] Ibid
[17] Ibid
[18] (1918) 246 US 231
[19] Ibid
[20] *Neeraj Malhotra* v *Deustche Post Bank Home Finance Ltd. & Ors*, (5 of 2009) decided on 2nd December 2010

applicable to other jurisdiction where certain agreements are per se anti-competitive and cannot be rebutted. Under Section 3(3), certain agreements are presumed to be anti-competitive, but this presumption is clearly rebuttable.[21]

The per se rule finds no relevance under the Competition Act, 2002 but, according to US Supreme Court, certain practices or acts are deemed or presumed to have an AAEC, and therefore are themselves listed and prohibited.[22]

Section 3 of the Competition Act relates to the anti-competitive agreement with respect to production, supply, distribution, storage, acquisition, or control of goods or provision of services which causes or is likely to cause and appreciable adverse effect on competition (AAEC) within India.[23] Further, section 3(2) provides that any agreement[24] in contravention of this provision shall be void.[25] An appreciable adverse effect on competition (AAEC) is not defined under the Act, but it is to be determined by Competition Commission of India (CCI) by considering factors mentioned in section 19(3),[26] of which one of the factor is accrual of benefits to consumers.[27] It provides that it is not always necessary that agreement must be in writing. It can be present in any form and which will be inferred from the facts and circumstances of each case. Agreement can be studies under two categories: 1.) Horizontal Agreement and; 2.) Vertical Agreement.

The example of such a case where consumers suffered due to anti-competitive agreement is the example of *Builders Association of India* v. *Cement Manufacturers' Association and*

[21] Ibid

[22] Supra note 11 at 72

[23] Section 3(1) of Indian competition Act, 2002

[24] Section 2 (b) “agreement" includes any arrangement or understanding or action in concert,-

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

[25] Section 3(2) of Indian competition Act, 2002

[26] Section 19(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[27] Jayant Kumar and Garima Panwarl (2013), *An interface between Competition Law and Consumer Welfare*, Competition Law Report, Vol. 3 Part-III, December, P.325

Ors.[28]. In 2011 the Indian Builders Association filed a complaint against 11 cement manufacturers alleging that they had formed a cartel to restrict the output and fixed prices. The investigating body of the Commission that is the Director General initiated the investigation and submitted in its report that there was an anti-competitive agreement between the manufacturers though it was not in writing but facts clearly stated that it cannot be mere coincidence that at the same time the price of 11 cement companies would be similar. Thus, there was formation of cartel between them.

The CCI in its judgment noted down the following points:

i. It observed that act and the conduct of the cement companies clearly establish that there are cartels.
ii. Their conduct of business is anti-competitive because by forming a cartel they have not only limited the competition but also have tried to control the price and production of cement in India.
iii. CCI also observed that their act is not only detrimental to the consumers but also has affected the whole economy by limiting the competition.

Hence, in this case CCI imposed fine of just over 6307 cr. against the 11 largest cement manufacturers in India and the cement Manufacturers Association. In this case the cement manufacturers association have filed their appeal before the Competition Appellate Tribunal (COMPAT) yet looking into the seriousness of the matter the COMPAT has ordered to file 10 percent of the said amount in the escrow account. The appeal in this case was filed in June 2013 and it is yet to be disposed off.[29]

The recent case which can be noted in this regard is the case *The Competition Commission of India* v. *Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.*[30] The Supreme Court has held that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the protection in the name of the language goes against the interest of the competition,

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[28] 2012 Comp LR 629 (CCI) URL: http://www.indiankanoon.org/doc/163933884/. Retrieved on 16/01/2014, at 3:35 pm

[29] Robert. E. Connoly, Nisha Menon and Joymin Mathew, *India's competition act takes shape with enforcement actions and appeals*, DLA Piper Global Law Firm, Rerieved from http://www.dlapiper.com/indias_competitionact_takes_shape_keycases_keypoints/ on 15/01/2014 at 2:50 pm

[30] Civil Appeal No. 6691 of 2014 Retrieved from http://judis.nic.in/supremecourt/chejudis.asp on 24/03/2017

depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; *albeit* for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3) (b) of the Act.

Exceptions

The provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights or to impose such reasonable conditions as may be necessary for the purposes of protecting any of his rights which have been or may be conferred upon him under the following intellectual property right statutes;

1. The Copyright Act, 1957;
2. The Patents Act, 1970;
3. The Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
4. The Geographical Indications of Goods (Registration and Protection) Act, 1999;
5. The Designs Act, 2000;
6. The Semi-conductor Integrated Circuits Layout-Design Act, 2000.

The rationale for this exception is that the bundle of rights that are included in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services.[31]

However, it may be noted, that the Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and

[31] Dr. S. Chakravarthy, *MRTP Act Metamorphoses into competition Act*

services will fall within the contours of competition law as long as they are not in reasonable position with the bundle of rights that go with intellectual property rights.[32]

The practices which are prohibited under this clause are price fixing; limiting or controlling production, supply, markets, technical development; market sharing; bid rigging or collusive bidding; cartels (horizontal agreements); tie-in arrangement; exclusive supply agreement; exclusive distribution agreement; refusal to deal; resale price maintenance (vertical agreements). The prohibition of all these practices it increase fair competition in the market which result in fair price better quality of product etc. which benefits the consumer.

Yet another exception to the applicability of the provisions relating to anti-competition agreements is the right of any person to export goods from India, to the extent to which, an agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. In a manner of speaking, export cartels are outside the purview of competition law. In most jurisdictions, export cartels are exempted from the application of competition law. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments. Holistically, however, exemption of export cartels is against the concept of free competition

The Central Government has power under the Act to exempt from the application of the Act, or any provision thereof, a class of enterprises, a practice, an agreement etc.

IMPACTS OF ANTI-COMPETITVE PRACTICES ON CONSUMER

Anti-Competitive agreements results in following impact on consumers as –

- **Hike of Prices:** Anti-competitive agreements leave the consumer with no other choice other than to purchase such product on the price fixed by the seller. If the agreements are entered to limit the production of the product or supply of the same in market, there will be shortage of that product in market which would cause an unreasonable hike in the prices of that product. They increase their prices as the consumers are compelled to buy their products.

[32] Dr. S. Chakravarthy, "MRTP Act Metamorphoses into competition Act".

- **Reduce number of Choices:** Anti-competitive agreements, abuse of dominant position or combinations reduced the number of choices available to the customer on the long run. The agreements limiting the extent of market or production of goods or services either geographically or product-wise deprives the consumer of his choice to choose among the producers of product or providers of services.
- **Low Quality:** One effect of anti-competitive agreements can be that low quality products achieve a higher market share than would otherwise be the case. As the consumers are restricted to buy goods from a single producer, this assures the producer a fixed and assured consumer base and income. Thus they stop competing. Now as a result they deteriorate the quality of their products as they are assured of their customer base.
- **Lack of Innovation:** Companies participating in a cartel produce less and earn higher profits. As the consumers are restricted to buy goods from a single producer or on the price fixed by sellers, this assures the producer a fixed and assured consumer base and income. Thus they stop competing. In the long run competitiveness of the industry is undermined and the pressure is eliminated from competition to innovate and achieve cost efficiencies.
- **Misuse of Resources:** The consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase a good they actually want (the tying well), and so would prefer that the goods be sold separately. By preventing the technical development in any product or services, the consumer will be bound to reap the available product or services and will be deprives of new technically developed product and services. While, the agreements restraining investment in any market will prevent the development of that market ultimately causing the consumer to bear the cost of development of market. In this way, resources are misallocated and consumer welfare is reduced.

UNREASONABLE CONDITIONS

The agreements centralizing the power to regulate the market in one player allow him to impose unreasonable conditions in market which can be harmful to the consumer interest.