

APPRECIABLE ADVERSE EFFECT ON COMPETITION: FACTORS AND APPLICABILITY

by

Akhil Madan
&
Samyukta Rawat

ABSTRACT

The main objective of the Competition Act is to stop all those activities that create an adverse effect on competition. There are many ways by which there can be appreciable adverse effect on competition like anti-competitive agreements, combinations and abuse of dominance. The Competition Commission of India prohibits the practices having adverse effect on competition, promote and sustain competition, secure the interests of buyers and guarantee opportunities of trade in the business sector of India. The CCI aims to weed out such practices which have an appreciable adverse effect on competition by restricting anti-competitive agreements. The main focus of this paper is to provide a detailed analysis of the anti-competitive practices having AAEC. The competition laws in India are made keeping in mind the economic advancement of market as well as the economy. The aim is to present the readers with a better understanding of the arrangements which lead to anti-competitive practices and also the factors which help in determining whether such agreements have an appreciable adverse effect on competition in India and how it disturbs the equilibrium of healthy competition and ultimately hampers the economy in a precise manner.

Keywords: anti-competitive agreements, combinations, abuse of dominance, appreciable adverse effect.

LIST OF AUTHORITIES

- **CCI V. M/S Puja Enterprises & Ors**
(https://www.cci.gov.in/sites/default/files/012012_0.pdf)
- **Shamsher Kataria v. Honda Siel Cars Ltd**
(<https://www.cci.gov.in/sites/default/files/03201127.pdf>)
- **Automobiles Dealers Association v. Global Automobiles Limited & Another**
(https://www.cci.gov.in/sites/default/files/CaseNo33of2011_0.pdf)
- **Rajasthan Cylinders v. Competition Commission of India**
(<https://www.barandbench.com/columns/rajasthan-cylinders-cci-competition-commission-bid-rigging>)
- **Excel Crop Care Limited v. Competition Commission of India**
(<https://indiacorplaw.in/2018/06/appreciable-adverse-effects-competition-circumstantial-evidence-antitrust-investigations.html>)
- **Star India Pvt. Ltd. V. Competition Commission of India**
(<https://www.cci.gov.in/sites/default/files/Case%20No.%2030%20of%202017.pdf>)

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INTRODUCTION

When there already exists economic rivalry amongst the enterprises or companies for drawing the maximum number of customers and make most of the profit, such a situation is known as competition. The law made by legislature to regulate such competition is known as competition law. A free, fair, healthy & reasonable competition prevailing in the market is a sine qua non for creation and maintenance of a balanced environment for business so that the country can prosper. It is the motto of all the competition laws around the world to make sure there exists such an environment where all the companies and individuals can deal with fair competition. There are many legislations of competition law that exists today. Some of the laws are century old (Sherman Act of U.S) while some bloomed recently (Indian Competition Act, 2002) and are still going through various improvements. The structure of the law has been made in such a way that it provides fair and reasonable chance to all the companies in the market to have a healthy competition to protect the interests of consumers as well. The Competition Act, 2002 also allows the CCI to prohibit all those activities that create an appreciable adverse effect on competition. The agreements which cause or are likely to cause an appreciable adverse effect on competition are called anti-competitive agreements. In India enterprises or two or more individuals are prohibited from entering into anti-competitive agreements. As per **sec 3(1)** of the Competition Act, 2002 “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 India¹.”

RESEARCH OBJECTIVES

- a) To study various legal provisions related to “Appreciable adverse effects on competition” under Competition law.
- b) To understand the relevance of the present legal regime and test their efficacy.
- c) To apprehend the future of legal activities and predict the legal challenges.
- d) To understand the legal dogmatic approach by systematizing and interpreting legal rules, judicial decisions and doctrines in the relevant areas

¹ <https://www.lawctopus.com/academike/real-meaning-per-se-rule-indian-competition-law/>

RESEARCH QUESTIONS

- a) Is there a presumption of cartelization and illegal information exchange when firms engage in parallel pricing?
- b) When can a combination be said to have an adverse effect?

RESEARCH METHODOLOGY

The research will be majorly Doctrinal in nature. It will be doctrinal because in course of the research several articles, case laws and the other law regime will be referred to find out the current structure of competition law. The research starts with an orientation in the economic theory behind the concept of AAEC. Moreover, articles of various authors, text books and websites will also be referred. Doctrinal methodology refers to a method of conducting research that is commonly referred to as “typical legal research”. A doctrinal research approach will concentrate on case laws, statutes and other legal sources. Strong legal research will begin with a solid doctrinal analysis.

The doctrinal methodology can include any type of purely legal analysis, such as history of law (e.g., Roman Law), what the law was previously, what the law is now, and whether there are indications that the law is evolving or developing. It is frequently associated with positivist legal research – the law is what the law says it is, rather than investigating the morality or effectiveness of the law – which is both a strength and a weakness. A doctrinal focus is often a good starting point in legal research, but a lot of legal research will need to go beyond a purely doctrinal approach. The primary source of the data will be The Competition Law Act, 2002 while the secondary sources would include several books, articles, websites etc.

LITERATURE REVIEW

The Competition Act of India was enacted as a result of India’s pursuit of globalization and liberalization of the economy. The Act does not intend to prohibit the competition in the market but it seeks to regulate such practices which have an appreciable adverse effect on competition (AAEC) in the market in India. The act also promotes free and fair competition in the market, protects consumer interests and ensures freedom of trade in the markets of India. Controlling such activities which lead to AAEC is one of the main objective of the Competition Act. The following are the ways by which there can be AAEC:

- Anti-competitive agreements

- Combinations
- Abuse of dominance

WHAT IS AN AGREEMENT?

The definition of ‘agreement’ as given in Section 2 (b) of The Competition Act, 2002 requires inter alia any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. This definition is an inclusive one and covers not only an agreement in the conventional sense under the Indian Contract Act, 1872 but also any arrangement, understanding or action in concert between two or more parties whether formal or in writing or whether enforceable by law or not. The Competition Commission of India in Reference Case No.1 of 2012 by DG (S&D) against *M/S Puja Enterprises & Ors*² on 06.08.2013 has held the definition of ‘agreement’ to be a wide one. The CCI was of the view that understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely a direct evidence of action in concert and the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In the light of the definition of the term ‘agreement’, the Commission has to find sufficiency of evidence on the basis of benchmark of ‘preponderance of probabilities’³.

ANTI-COMPETITIVE AGREEMENTS UNDER COMPETITION ACT

As per Sec 3(1) 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, is an Anti-Competitive Agreement. The underlying idea behind the inclusion of the provision concerning anti-competitive agreements in India’s competition law is to promote competition in order to enhance the welfare and interest of the consumers. Further Section 3(2) states that if a company enters into an agreement that violates the Act’s general restrictions, the agreement is deemed null and void. Anti-competitive agreements are classified into two types, based on provisions of Section 3 of the Act: Horizontal and Vertical agreements

² https://www.cci.gov.in/sites/default/files/012012_0.pdf

³ <https://www.tclindia.in/what-is-an-agreement-under-the-competition-act-2002/>

1. **Horizontal Agreements-** These are agreements that generally arise between two or more companies or enterprise that compete in the same market in terms of production, supply distribution, and so on. Horizontal anti-competitive agreements would include, for example, an agreement between manufacturer of a specific commodity not to supply a particular product at lower price or not to supply a product to a specific market.

Competition Act, 2002 prohibits following types of horizontal agreements namely:

- (i) Agreements regarding fixing of purchase or selling prices of a product either directly or indirectly.
- (ii) Agreements with regard to limit, control production, supply, investment, provision of services of particular products and for a particular quantity.
- (iii) Agreement regarding sharing of market
- (iv) Bid Rigging Agreements.

Explanation to Section 3(3)(d) defines ‘bid rigging’ as an agreement between parties engaged in identical business, which has the effect of eliminating or reducing the competition for bids or adversely affecting or manipulating the process for bidding.

- (v) Agreements in the form of Cartels.

Cartels are created by anti-competitive horizontal agreements among business enterprises. They pose a great threat to competition and ultimately tend to destroy the free trade. In fact cartels are secret agreements between business firms with the sole objective of fixing prices or sharing markets between them⁴.

2. **Vertical Agreements-** Vertical agreements, according to section 3(4) of the act, are those that take place between enterprises or persons at different stages or levels of production in terms of production, supply, distribution, storage, sale, or price of goods, etc. The competition act gives a list of vertical agreements that can possibly cause AAEC:

- (i) **Tie in arrangement-** An agreement which is between producer and distributor to not sell the manufactured product above price floor or below price ceiling.
- (ii) **Exclusive supply agreement-** They stop the purchase in course of trade from acquiring the goods of trade from acquiring the goods of any other seller.
- (iii) **Exclusive distribution agreement-** This limits or withhold the supply of any products or allocation of any area or market for the sale of goods.

⁴ https://amity.edu/UserFiles/aibs/2e892019%20AIJJS_37-46.pdf

- (iv) **Refusal to deal-** Any agreement which prohibits by any method the persons or group of persons to whom goods are sold or from whom goods are bought.
- (v) **Resale price maintenance-** it means the consent to sell products on condition that the costs to be charged on the resale will be specified by the seller except when it is clearly stated prices lower than what may be charged⁵.

A recent example of Vertical agreement is the judgement passed by CCI on 23/08/2021. CCI imposed a penalty of Rs 200 crore on Maruti Suzuki India Ltd. For restricting dealers from offering discounts to customers. It was found that a ‘discount control policy’ was in place for dealers by which they were not allowed to provide discounts or freebies to the customers more than what was permitted by the Company⁶. In *Shamsher Kataria v. Honda Sael Cars Ltd*⁷, the genuine spare parts of the vehicles and other diagnostic tools were not provided in their respective markets and according to the arrangement between the Manufacturer of the spare parts and the authorized dealers of the vehicles, it was decided that the only source of the spare parts will be the OEM (Original Equipment Manufacturer) or the vendors authorized by them only. The CCI decided that “such an agreement permitted the manufacturer to enjoy exclusive profits made from them as they were the only ones dealing in them as the product was not made available in the open market, making the OEM a monopolistic player in the market for their automobiles.” They created entry barriers and this enabled them to overcharge the customer for their goods as they don’t have any other viable option available to them.

FACTORS AND APPLICABILITY

The CCI considers all or any of the following elements stated under section 19(3) of the Act while determining whether an agreement has an AAEC under section 3:

- (i) Conception of barriers to new entrants in the market;
- (ii) Driving accessible competitors out of the market;
- (iii) Foreclosure of competition by hindering entry into the market;
- (iv) Accrual of reimbursement to consumers;

⁵https://www.srcc.edu/sites/default/files/B.com%20H_sem%20vi_Consumer%20affairs%20and%20Customer%20Care_Ms.%20Kavita%20Kamboj.pdf

⁶<https://www.thehindu.com/business/cci-fines-maruti-suzuki-200-crore/article36067092.ece>

⁷ <https://www.cci.gov.in/sites/default/files/03201127.pdf>

- (v) improvements in construction or giving out of goods or provision of services;
- (vi) Promotion of technical, scientific and economic development by means of production⁸.

The CCI shall have ‘unpaid regard to all or any of the aforementioned factors, according to section 19(3). The CCI has evaluated the allegations and substance on record as against the elements of section 19(3) as set out above in many adjudications. However, in *Automobiles Dealers Association v. Global Automobiles Limited & Another*⁹, CCI held that it would be cautious to scrutinise an action in the surroundings of all the factors mentioned in Section 19(3)¹⁰.

To bring in the application of section 3, it is pertinent that the effect on competition must be ‘appreciable’. The word “appreciable adverse effect on competition,” which appears in section 3(1), is not defined in the Act. Under the competition act, determining what is ‘appreciable’ has proven to be a major challenge for CCI. The author T. Ramappa considers that to be considered ‘appreciable,’ the effect has to be substantial¹¹. However, this may not be in India’s best interest economically. As a result, the Law Lexicon¹² defines “appreciable” as “capable of being judged of or recognised by the intellect,” which is “perceptible but not a synonym of substantial.” For the most part, ‘appreciable’ means more than just a detectable influence that may or may not be substantial.

PRESUMPTION OF APPRECIABLE ADVERSE EFFECT

There is a presumed appreciable adverse effect on competition if the arrangement complies with section 3(3) of the Competition Act, 2002. In the sub-section 3 of section 3 of the Competition Act, it is presumed that the agreement is having an appreciable adverse effect on competition under any clause of this section. Even if there is no concrete evidence proving appreciable adverse effect, it’ll be presumed and the burden will be on the enterprises or the people who entered into the arrangement to prove otherwise, in this the burden is shifted from CCI to the people who entered into the agreement. So, the courts are bound to consider the

⁸ <https://blog.finology.in/Legal-news/Anti-Competitive-Practices-under-Indian-Competition-Law>

⁹ https://www.cci.gov.in/sites/default/files/CaseNo33of2011_0.pdf

¹⁰ https://www.lawctopus.com/academike/real-meaning-per-se-rule-indian-competition-law/#_edn10

¹¹ T. Ramappa, Competition Law In India- Policy, Issues and Development, Oxford India Paperbacks, 2nd Ed (2009)

¹² <https://www.latestlaws.com/wp-content/uploads/2015/04/Legal-Dictionary.pdf>

fact as proved until contrary evidence is provided to disprove it, which makes this presumption rebuttable. Although, this is not enough as these agreements aren't considered as final proof and if the parties which entered into the agreement provides sufficient evidence to rebut the presumption then Competition Commission has to take the factors of section 19(3) of the Act into account and check to see whether any or all of these factors are established. If the evidence provided by CCI brings about any or all the factors mentioned in section 19(3), the agreement is again said to be having AAEC until proved otherwise. In the case **Rajasthan Cylinders v. Competition Commission of India**, the DG in its report indicated instances when the appellants met to allegedly discuss the tender prices. Based on these findings, the Competition Commission of India (CCI), as well as the Appellate Tribunal, confirmed the allegation of bid-rigging and imposed penalties. The Apex Court identified that this is a case where the buyers are very few and they have control over the prices of the goods being sold by the seller. Such a situation is known as 'oligopsony'. To substantiate this aspect, the Court took recourse to judgments of the European Court of Justice which addresses the concept of 'oligopsony' vis a vis competition law. Based on these findings, the Supreme Court allowed the appeal of the sellers and set aside the allegation of bid-rigging under the Act¹³.

In **Excel Crop Care Limited v. Competition Commission of India**¹⁴, the issue before the Supreme Court of India was whether the four producers of Aluminium Phosphide Tablets had formed a cartel by getting into anti-competitive agreements among themselves since these makers cited exact same rates for their products. Without any conclusive proof of the agreement, the Apex Court relied on circumstantial proof according to the character of these organizations. It was seen that there are very few manufacturers in the chemical industry, and despite having different cost of production, geographical area and profit margins, these producers have cited exact same rates. Accordingly, the Court held the appellants guilty under Section 3 of the Competition Act¹⁵.

In section 3(4) there is no presumption of AAEC, here the burden of proof is on CCI to prove that there is an appreciable adverse effect on the competition on the basis of the factors given

¹³ <https://www.barandbench.com/columns/rajasthan-cylinders-cci-competition-commission-bid-rigging>

¹⁴ <https://indiacorplaw.in/2018/06/appreciable-adverse-effects-competition-circumstantial-evidence-antitrust-investigations.html>

¹⁵ <https://www.scconline.com/blog/post/2020/01/13/clipping-the-dgs-and-ccis-investigative-power-recent-trends/>

in section 19(3) of the competition act. In **Star India Pvt. Ltd. V. Competition Commission of India**¹⁶, the Court held that “*the Commission was under an obligation to arrive at a prima facie finding that the conduct of Star and Sony causes AAEC and since there is no prima facie finding by CCI on AAEC, the mandatory jurisdictional pre-requisite of a prima facie view of Section 3(4) was absent*”. The order passed by CCI was overturned as it did not comply with the procedure laid down by the Competition Act and the Supreme Court’s decision in CCI v. Bharti Airtel¹⁷.

CONCLUSION

The act aims to prevent parties with AAEC in India from engaging unethical behaviour. However, such an aim will not be achieved unless the parties doing business adhere to the act’s principles. When doing business in India, it is critical for parties to avoid keeping any anti-competitive elements in their agreements. In order to function properly in the market, there must be fair competition. Enterprises should be proactive in addressing anti-competitive elements in their current agreements. Employees can be informed on the consequences of anti-competitive agreements and how to avoid them. Individuals and businesses can always seek the advice of experts who can lead them to a safer option if necessary.

¹⁶ <https://www.cci.gov.in/sites/default/files/Case%20No.%2030%20of%202017.pdf>

¹⁷ <https://www.mondaq.com/india/antitrust-eu-competition-/864788/bombay-high-court-sets-aside-cci-order-directing-investigation-against-sony-and-star-reopens-the-conflict-of-jurisdiction-issue-between-the-competition-and-sector-regulator>

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