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ANTI-COMPETITIVE AGREEMENTS: CONCEPTS UNDER COMPETITION ACT 2002

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ABSTRACT

The competition laws of various countries absorb the idea that no enterprise or association of enterprises or person or association of persons shall enter into any agreement which relates to production, supply or distribution of goods or provision or services which causes or is likely to cause an appreciable effect on competition in their country and that such an agreement would be declared void. The same rests on the premise that competition law is designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade, and that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country, the lowest prices, the highest quality and greatest material progress. This Article provides key insights into the agreements which are Anti-Competitive in nature and what can potentially tantamount to an anti-competitive behaviour.

Key words: *Anti-Competitive Agreements – Cartels, Price fixing- Bid rigging-Predatory pricing.*

INTRODUCTION

"A dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy".

The Indian economy underwent a paradigm shift owing to the widespread economic reforms that were undertaken in the nineties, moving away from 'command and control economy to an economy reliant on free market principles. Consequently, the extant of competition law regime governed by the Monopolies and Restrictive Trade Practices Act (MRTP Act) called for an overhaul in order for it to address the needs and challenges of the new economic paradigm. The Competition Act 2002 was subsequently amended by the Competition (Amendment) Act 2007, the Competition (Amendment) Act 2009 the Competition (Amendment) Act 2012.Competition is irrefutably beneficial for every market participant. Competitive markets give consumers wider choice at lower prices. It gives sellers stronger incentives to minimize their costs through innovation and other productivity enhancing techniques. This enables firms to pass on cost savings to the customers and offer better products and greater choice at lower prices.

Competition Act, 2002

Competition Act, 2002was enacted to provide, keeping in view of the economic development of the country, the establishment of a Commission with the following objectives:-

- prevent practices having adverse effect on competition,
- promote and sustain competition in markets,

- Protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.
- Ensuring freedom of trade.

The term appreciable adverse effect has not been defined in the Act, but section 19(3) of the Act provides for certain factors to be given due regard by the commission while determining whether an agreement have Appreciable Adverse Effect on Competition (AAEC) or not, The species of agreement which would be considered to have an 'appreciable adverse effect on competition" would be those agreements which:

- Directly or indirectly determine sale or purchase prices;
- Limit or control production, supply, markets, technical development, investment or provision of services;
- Share the market or source of production or provision of services by allocation of inter alia geographical area of market, nature of goods or number of customers or any other similar way
- Directly or indirectly result in bid rigging or collusive bidding.
- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services;

Further, the agreements, which are entered into in respect of various intellectual property rights and which recognize the proprietary rights of one party over the other in respect of trademarks, patents, copyrights, geographical indicators, industrial designs and semi conductors have been withdrawn from the purview of "anti competitive agreements". The inherently monopolistic rights created in favour of bona fide holders of various forms of intellectual property have been treated as sacrosanct.

Anticompetitive agreements can be said to be agreements that negatively or adversely impact the process of competition in the market. According to an OECD/World Bank Glossary, anticompetitive practices refer to a wide range of business practices that a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing foods and services at a lower cost or higher quality. Similarly, it can be said that anticompetitive agreements are agreements between firms or enterprises that restrict or prevent or otherwise unfavourably affect competition, and that may help increase the market position or share of the parties and may also be to the disadvantage of the consumer as the products and services may be available at a higher cost than are available in a competitive market and also may be of a lower quality.

Prohibition of anti-Competitive Agreements has been provided under Section 3 Chapter II of the Act dealing with prohibition of certain agreements, abuse of dominant position and regulation of combinations of the Act. The provisions of the Competition Act relating to anti-competitive agreements were notified on 20th May, 2009.

Section 3 prescribes certain practices which will be anti-competitive and the Act has also provided a wide definition of agreement under section 2 (b).

Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.

Section 3(2) simply declares agreement under section 3(1) void.

Section 3(3) deals with certain specific anti competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels.

Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier.

Section 3 (5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.

Competition laws in all over the world usually places anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements. Horizontal agreements are generally viewed more seriously than the vertical agreements. 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 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.

The Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3 (4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti competitive agreements.

Practices recognised as Anti-competitive practice under Section 3

Anti-competitive practices are those practices which reduce competition in a market and hamper consumer interests. These practices include:

Cartels:Cartels are agreements between enterprises (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice for goods or/and services.

If there is effective competition in the market, cartels would findit difficult to be formed and sustained. Some of the conditions that are advantageous to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion

Resale price maintenance: this is a concerted practice having their direct or indirect object the establishment of a fixed price or a minimum price level to be observed by the buyer. In this type of practice resellers are not allowed to set prices independently.

Exclusive dealing and purchasing: under such an agreement a retailer agrees to purchase or deal in the goods of only one manufacturer making entry difficult for the new manufacturers. In this type of practice a retailer or wholesaler is obliged by contract to only purchase from the contracted supplier.

Tie in sales, full time forcing, quantity forcing and fidelity discounts: Tie in sales make the purchase of one product conditional on the same of another product. Full line forcing is an extreme case of the former where the retailer must stockthe full range of the manufacturers' products. Under quantity forcing the retailer is required to purchase a minimum quantity of certain product. Under fidelity discounts, the retailer receives discounts based on its proportion of its sales coming from the manufacturer. Such arrangements could make entry difficult for the manufacturer and retailers.

Slotting fees: this requires the manufacturer to pay a fee to get its product stocked. Such entry could make difficult for entry of the new manufacturers.

Non-linear and franchise fees: These involve payment of non-cost related discounts to existing retailers or franchise fees, thus raising the sunk cost of entry and making difficult for entry for other retailers.

Price fixing: It is an agreement between the potential competitors wherein they lay down a price to sell their goods. The aim and result of every effective price fixing agreement is the elimination of one form of competition. Agreements which create such potential power may well be held to be ain themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable.

Bid rigging: Bid rigging agreements are agreements among competing bidders or potential bidders that affect the prices they will bid for, or the attempt to secretly influence the outcome of a contract or series of contracts. Bid rigging is per se illegal irrespective of the fact that it does not matter whether the agreement concerns what the low bid would be, the quantum of the individual bidders bidding and the bidder who would win the contract.

Output or production restrictions: Output or production restrictions are agreements between competitors wherein the competitors agree to curtail output or restrict production. There is a resumption that such kinds of agreements are made to limit supply and gain the ability to raise prices and such sort of agreements are treated illegal *per se*.

Concerted refusal to deal: A concerted refusal not to deal with particular or specified group of suppliers or customers. This is also known as group boycott wherein there is a horizontal concerted refusal to deal involves an agreement between two or more competitors to refuse to deal with other competitors or class of competitors, or with one or group of suppliers or customers.

Single branding: Single branding involves the agreements which have as their main element that the buyer is induced to concentrate his orders for a particular type of product with one supplier. This component can be found in non-compete and quantity forcing on the buyer, where an obligation or incentive scheme agreed between the supplier and the buyer makes the latter purchase the requirements for a particular products and its substitutes from one supplier. The possible anti-competitive effects and 0otential suppliers, facilitation of collusion between suppliers in case of cumulative use and where the buyer is the retailer selling to the final consumers, a loss of inter brand competition.

Market partitioning: This covers the agreements directly or indirectly limiting a buyer to buy or sell a particular product in a particular area. This component can be found in exclusive purchasing, where an obligation or incentive scheme agreed between the supplier and the buyer makers the later purchase the requirements for a particular product exclusively from the designated supplier but leaving the buyer free to buy and sell competing products.

Predatory pricing/Dumping: It is a pricing strategy where a product or service is set at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new competitors. If competitors or potential competitors cannot sustain equal or lower prices without losing money, they go out of business or choose not to enter the business. The predatory merchant then has fewer competitors or is even a de facto monopoly.

Dividing territories: An agreement by two companies to stay out of each other's way and reduce competition in the agreed upon territories.

Absorption of a competitor or competing technology: where the powerful firm effectively co-opts or swallows its competitor rather than see it either compete directly or be absorbed by another firm.

Here it is noteworthy to say that the new economic policy of 1991 on one hand has made our life comfortable as the goods and services required for our use are available in abundance and on the other hand it has also opened new challenges for preventing anti-competitive agreements by manufacturers and service providers. Competition law is the principal legislative instrument for furthering competition policy and combating anti-competitive agreements. Under the Competition Act, 2002 there has been made adequate provisions for preventing anti-competitive agreements and has also created an institution i.e. Competition Commission of India (CCI) to ensure effective implementation of the Act.

However Competition Act and CCI are to be adequately empowered to take off such situations. Provisions relating to prohibition of anti-competitive agreements under the Act are, to some extent adequate to maintain fair competition in the market and thereby protect interest of consumers. However they are needed to be strictly observed and implemented.

Conclusion

It is needless to say that this dynamic statute can touch and change the way trade functions on a day to day basis. What is important for companies to note is the fact that some age old practices, which earned legitimacy because of their permanence and failure of the MRTP Commission to address them, would become the primary targets of the well-empowered CCI. Enterprises in India, therefore, need to understand the new law and update themselves regularly on the new policies and regulations.

References:

Abir Roy Jayant Kumar, Competition Law in India. Eastern Law House, 2008

DhallVinod, _Competition Law Today; Concepts, Issues, and Law in Practice‘, Oxford University Press, (2007).

Khemani R. S.A framework for the design and implementation of competition law and policy, World Bank publications (1999), PgV(Preface).

Pradeep D Mehta (ed.), TOWARDS A

FUNCTIONAL COMPETITION POLICY FOR INDIA AN OERVIEW, 2005, Academic Foundation, New Delhi

Ramappa T. ‘Competition Law in India- Policy, issues and Developments’ Oxford University Press, (2006).

Smith Adam, an Inquiry into the Nature and Causes of the Wealth of Nations, London Publication (1776) Pg 88.

Whish Richard, _Competition Law‘ Oxford University Press. 6th Edition, (2009).

World Bank/OECD: “Glossary of Industrial Organization on Economics and Competition Law”.

http://www.cci.gov.in/index.php?option=com_content&task=view&id=140

http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2341/india-overview/

http://en.wik

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