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DETAILED ANALYSIS ON THE PROVISIONS OF ANTI COMPETITIVE AGREEMENT UNDER THE COMPETITION ACT 2002

By: S.R.Jaya Saline

Synopsis

- 1. Introduction**
- 2. Anti-competitive agreement**
- 3. Appreciable adverse effect**
- 4. Inquiry**
- 5. Order**
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Introduction

Anti-competitive agreements under the competition act 2002 or in the nature of restrictive trade practice. Firms enter into agreements, which may have the potential of restricting, distorting, suppressing, reducing or lessening competition. Let's discuss about the agreements that are restricted under the competition act 2002.

Anti-competitive agreement

- The word agreement is defined under section 2 (b) of the competition act 2002, – it includes any arrangements or understanding or action in concert, whether or not such

arrangements or action is formal or in writing, whether or not such understanding or action is intended to be enforceable by legal proceedings.¹

- Section 3 of the act prohibits agreements which restrict the production, supply, distribution, acquisition or control of goods or provision of services, which cost or are likely to cause an appreciable adverse effect on competition within India.
- If any agreement is entered into, which is contrary to section 3 is declared to be void.²

To find any agreement is anti-competitive there are two test,

1. 'Per se' rule — The act itself is void
2. Rule of reason — under the rule of reason, courts examine both the positive and negative effects of an agreement before determining whether it violates antitrust laws.

Cartel - is an Association of Manufacturers or suppliers with the purpose of maintaining prices at a high level and restricting competition, which is harmful.³

Factors to be considered agreement is whether an anti-competitive agreement or not, CCI will look into it,

1. Contents of agreement - need not be formal, and writing, legally enforceable by law.
2. Actual conduct or behaviour of parties in the relevant market.
3. Subject to intention on the parties to restrict competition.
4. The way in which the agreement operates.⁴

Under anti-competitive agreement, there are two types of agreements

1. Horizontal agreement
2. Vertical agreement

¹ Avtar Singh book on "Competition Law" by EBC edition 2021

² Section 3 of the competition act 2002

³ Avtar Singh book on "Competition Law" by EBC edition 2021

⁴ Versha Vahini Textbook on "Indian Competition Law" by Lexis Nexis edition 2021
Bare act – The competition act 2002

Horizontal agreement

- An agreement between Enterprises and each of which operates at same level in the production or distribution check.
- Section 3 (3) of the competition act 2002 deals with horizontal agreement.
- Cartel is a horizontal agreement.
- Presumption of adverse effect on competition: As per section 3 (3) if any agreement determines,

i. **Price fixation** - Where the agreement not to sell goods or services below a certain price.

US versus Cohen grocery

It has been held that, price fixation is per se void ⁵

ii. **Output control** - if there is a higher demand then sale of goods for a higher price.

Cement cartel case

In this case it has been held that cement companies are acting in concert in fixing prices of cement in contravention of the provision of section 3 (1) read with section 3 (3) (a) of the act. CCI imposed penalties upon 10 cement companies and their trade association that is cement Manufacturers Association for cartelisation in the cement industry.⁶

iii. **Bid rigging** - directly or indirectly results in bid rigging or collusive bidding. That is not to complete each other

Types of bid rigging

1. Cover bids

⁵ 255 U.S. 81 (1921)

⁶ Case No. 29 of 2010

2. Bids suppression
3. Bids rotation

Aluminium Phosphide cartel case

Bid-rigging, according to the court, is a technique in which all bidders agree to collaborate on a tender response, and it is most common in government procurement. Participants in bids do not compete with one another; instead, they secretly collaborate and show their support for one bidder for a specific tender, affecting the price; later, they can share a specific percentage of commission or profit, or they can bid on different occasions based on their secret agreement.⁷

- iv. **Market sharing** - means the division of the market so that there will be no competition among the competitors in the market and one will enjoy an absolute monopoly over profits in their market division. Such marketing happens generally by allocating the geographical area to each player in the market or based on customer allocation.

The market sharing agreement will be deemed to presume an appreciable adverse effect on competition

Us vs topco association

The United States Supreme Court held that , holding that Topco scheme of allocating territories to minimize competition at the retail level is a horizontal restraint constituting a per se violation of section 1 of the Sherman Act.⁸

Vertical agreement

- Section 3 (4) of the act deals with vertical agreement

⁷ Case No.02 of 2011

⁸ 405 U.S. 596 (1972)

- Vertical agreements are those between parties on different levels of the chain of distribution, such as between a manufacturer and a distributor, or between a wholesaler and a retailer
- Vertical agreement includes,

i. **Tie in arrangements**

Ties product with another product. A seller who agrees to sell a desirable product only on precondition that the buyer should purchase a less desirable second product

Conditions

- Seller conditioned sale of one product or services on the purchase of second product or service
- Second product or service are two separate product, they are not part of same product
- Seller has sufficient position in the market for tie the product⁹

MRF Co Ltd case

It has been held that in the price of the scooter, they tied the cost of locker and helmet.¹⁰

ii. **Exclusive supply agreement**

Exclusive supply agreements are of the condition that the customer has to buy a product only from one supplier not from any of them.

iii. **Exclusive distribution agreement**

Exclusive distribution talks about how distribution of product should happen from manufacturer to consumer.

⁹ Versha Vahini Textbook on “Indian Competition Law” by Lexis Nexis edition 2021

¹⁰ <https://www.cci.gov.in>

DISTRIBUTION CHANNEL

➤ **DIRECT CHANNEL**

It is directly from manufacturer to consumer

➤ **INDIRECT CHANNEL**

- one level channel - (manufacturer - retailer - consumer)
- Two level channel - (manufacturer – wholesaler - retailer - consumer)
- Three level channel - (manufacturer – Agent- wholesaler - retailer - consumer)

Sonam Sharma versus Apple

In this case, there is a distribution agreement between Apple iPhone vs Airtel and Vodafone. Airtel and Vodafone act as distributors of iPhone. So they provide Distributors in the market for iPhone.¹¹

iv. Refusal to deal

Refusal to deal includes agreement which restricts by any method the persons or classes of persons to whom the goods are sold or from whom goods are brought.

Inox versus Coca-Cola

The Competition Commission of India (CCI) "closed the matter" as it held that the agreement between inox and coca - cola does not found contravention of section 3 of the Competition Act.¹²

v. Resale price maintenance

The price of sale of goods is fixed by seller

¹¹ Case No. 24 of 2011

¹² Case No. 29 of 2018

Section 39 (1) of MRTP Act, which expressly prohibited resale price maintenance agreement

Types:

- Minimum resale price maintenance
- Maximum resale price maintenance
- Fixed resale price maintenance

Jasper Infotech pvt Ltd versus Kaff appliances

In this case, the kaff appliances mentioned in their website that “do not buy kaff appliances in Snapdeal” because they are selling unauthorisedly.¹³

Appreciable adverse effect

- Generally, agreements which cause appreciable adverse effect on business competition or anti-competitive agreements. Such agreement is a void agreement as per section 3 of the act
- Simply says that appreciable means which has to be more than just a detectable effect, weighted, judged but need not be substantial.¹⁴

Factors determining appreciable adverse effect on competition

According to section 19 (3) of the act, the commission should give due regard to all or any of the following factors while determining the appreciable adverse effect on competition,

1. Creation of barriers of new entrants in the market
2. Driving out existing competitors from the market
3. Foreclosure of competition by preventing entry into the market

The above three points relate to the negative effects on the competition

Let's discuss about the factors which relate to beneficial effects

4. Accrual of benefits to consumers
5. Improvements in production or distribution of goods or provision of services

¹³ Case No. 61 of 2014

¹⁴ Avtar Singh book on “Competition Law” by EBC edition 2021

6. Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.¹⁵

According to section 32(a) and 32(b) of the competition commission act 2002, Acts taking place outside India but having an effect on competition in India.—The Commission shall, notwithstanding that,—

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India¹⁶

Auto mobiles dealers Association versus global auto mobiles Ltd and another

The CCI held that it would be prudent to examine an action in the backdrop of all factors mentioned in section 19(3) of the act.

The agreement should be the cause of the adverse effect on the competition. Even if such a consequence is probable, the agreement is anti-competitive.¹⁷

Inquiry

- Section 26 of the competition act 2002 deals with inquiry¹⁸
- According to section 19(1) ,19(1)(a) and 19(1)(b) of the act, who can give a complaint?
- The competition commission may conduct inquiry on its own motion or suo Moto, or any person or trade association or any association of consumers accompanied by such fees determined by such regulations or by Central or state government or any statutory authority.¹⁹

¹⁵ Section 19(3) of the competition act 2002

¹⁶ Section 32 of the competition act 2002

¹⁷ Case No. 33 of 2011

¹⁸ Section 26 of the competition act 2002

¹⁹ Section 19 of the competition act 2002

- The Competition Commission of India (CCI) has the authority under Section 26 of the Competition Act, 2002 to request an investigation by the Director General in cases of "prima facie" violations of the Act.
- The Director General's investigation is necessary to analyse and comprehend the facts and issues in the case.
- To satisfy the Competition Commission of India (CCI) to order the Director General's investigation, the informant party must prove its allegations.

Order

- Section 27 of the competition act 2002 deals with order of CCI
- As per section 27 (a), the commission can ask party to discontinue an agreement immediately or not to re-enter such kind of agreement again.
- Section 27 (b) of the act deals with penalty provisions, The commission may impose banality which shall not more than 10% of average turnover for the last three preceding financial year upon person or each enterprises.
- Any agreement entered into cartel commission imposes upon each producer, seller, distributor, trader, service provider. Penalty of up to 3 times of its profit for each of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement whichever is higher
- Section 27 (d) says that commission shall direct that the agreement shall stand modified to the extent in the manner as may be specified in the order.
- According to Section 27 (e) and 27 (f) of the act, the commission pass order which shall fit for the case.²⁰

According to section 33 of the act, during an inquiry, if the commission is satisfied then CCI pass interim order. If the act is Committed or attempt to commit then CCI pass an interim order.²¹

²⁰ Section 27 of the competition act 2002

²¹ Section 33 of the competition act 2002

CONCLUSION

Therefore, the above are the detailed analysis on the topic of anti-competitive agreement under the competition act 2002. By seeing this article we came to understand the intention of the legislature in making provisions related to it and there also penalty provisions if there is any violation of provisions of the act. I hope it gives a clear idea about anti-competitive agreement with reference to case laws.

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