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## Analysis of Anti-Competitive Agreements under the Competition Law

Nithyaa H<sup>a</sup>

<sup>a</sup>The Tamilnadu Dr. Ambedkar Law University, Chennai, India

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*In India initially, all business transactions were regulated by the Monopolies and Restrictive Trade Practices Act of 1969. After the amendments, the Competition Act of 2002 came into existence. There are agreements that are void by their nature itself. Such agreements are called anti-competitive agreements and said agreements are prohibited by the Competition Act of 2002. They are tying arrangements, refusing to deal, resale price maintenance, cartels, and many more. There was a need to regulate all such anti-competitive activities of the enterprises and as a result of this, the Competition Commission of India was also created by the Competition Act of 2002.*

**Keywords:** *competition law, MRTP act, anti-competitive agreements, cartels, arrangements.*

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### INTRODUCTION

Businesses are growing rapidly in this 21<sup>st</sup> century. There is a large number of entrepreneurs emerging in society. In markets there exists competition between the enterprises. On some occasions, it may lead to misuse of the power of such large enterprises. Therefore initially the Monopolies and Restrictive Trade Practices Act were in existence to regulate all the transactions of business enterprises. But at one particular time, The MRTP Act was not

completely beneficial to regulate the field. Then the Competition Act of 2002 came into existence. One of the main advantages of the said Act was the establishment of the Competition Commission of India to regulate business transactions. There are many transactions valid and not valid. Especially the Anti Competitive Agreements are completely prohibited by the Competition Act of 2002. Attracting point over here is that, all these agreements need not cause harm, in reality, to be sued may just have a likely effect of causing harm which is sufficient to be sued and held void. There are many types of agreements that are prohibited by the said act. In this article, we will be discussing various types of anti-competitive agreements that are prohibited by the act.

### **WHAT IS COMPETITION?**

In each and every field there exists a competition. Competition arises when two or more persons want to defeat another or win over another. Especially in markets, competitors have to defeat others in order to expand their sales and reach their products to the customers. Business exists to gain some profit. Therefore in markets, competitors should be fair and loyal to the market rules. In normal vegetables and fruits markets, we find all varieties of fruits and vegetables. Likewise in this global market there exists all kinds of business dealings, production, and supply of various products.

### **WHAT ARE COMPETITIVE AGREEMENTS?**

Competitive Agreements are those in which two or more persons or enterprises get into an agreement or contract through which they determine their rights and liabilities in an existing competitive market. Agreements can also be referred to as arrangements. They fix their part of business and decide to carry their business in a particular field.

### **WHAT ARE ANTI-COMPETITIVE AGREEMENTS?**

An Anti - Competitive agreement might be characterized as one, which interferes with the commercial freedom of either party to the agreement to trade freely as it would wish<sup>1</sup>.

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<sup>1</sup> Abir Roy & Jayant Kumar, *Competition Law in India* ( Eastern Law House 2008) 55

Competitors may use an unfair method of competition. That is they may enter into Competitive Agreements that are harmful to others in the market. Two or more enterprises get into an agreement and decide to control the market rules and regulations where the other enterprises especially the smaller enterprises won't be able to succeed in the market. This is usually done by the strongest enterprise in the market. It can also take the form of a hidden contract which will be dealt with in this article. Under the EC Treaty, for an agreement to be anti-competitive, its main objective should be to prevent or distort competition and one need not prove that the effect of the agreement was anti-competitive.<sup>2</sup>

## **THE COMPETITION ACT OF 2002**

The Competition Act came into existence in the year of 2002. The Act was passed after a committee report and consultation with industry and the general public<sup>3</sup>. It came as a replacement for the Monopolies Restrictive Trade Practices Act of 1969. Both the Competition Act and The MRTP Act were framed to regulate the Market Rules and also to hear out the unjust practices that are in existence. Competition Act of 2002 established a Competition Commission under Section 7 of the Act<sup>4</sup>. Competition Commission was to hear the cases and decide the solutions and also provide the penalties. Central Government has established the Competition Commission of India.

## **PROHIBITION OF AGREEMENTS**

### ***Anti-Competitive Agreements under Section 3***

This section prohibits any person or group of persons or enterprises from entering into an Anti Competitive Agreement. Further, this section also declares such agreements as void. Agreements mean here any kind of agreement that is related to production, supply, distribution, storage and etc.

### ***Adverse Effects on Competition***

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<sup>2</sup> Treaties of the European Union, 2002, art.81

<sup>3</sup> Dr Avtar Singh, *Competition Law* ( First Edition, Eastern Book Company 2018)

<sup>4</sup> Dr Avtar Singh (n 3) at 183

One of the important words to be known to understand this concept is “Appreciable Adverse Effect On Competition”. That is the agreements that are causing an appreciable adverse effect on competition are void. It also declares such agreements that are likely to cause an appreciable adverse effect on competition as void. Agreements are considered illegal only if they result in unreasonable restrictions on competition and the same is tested on the rule of reason analysis<sup>5</sup>. Under the rule of reason analysis, the true test of legality is whether the restraint is imposed is such that it merely regulates or promotes competition or whether it is such that it suppresses or destroys the competition.<sup>6</sup>

Agreements that are causing an appreciable adverse effect on competition under dealt with under section 3(4). They are:-<sup>7</sup>

- Tie-in arrangements
- Exclusive supply agreements
- Exclusive distribution agreement
- Refusal to deal
- Resale price maintenance
- Cartel
- Bid Rigging

### **TIE IN ARRANGEMENTS**

Under these tying agreements, the consumer is forced to buy the product in order to purchase his desired product. That is two products will be tied together for sale. For a consumer who wants to buy only one desired product, there comes a condition to buy the tied product also in order to purchase his desired product. The nature of the tied product is immaterial to the consumers anyway he is forced to buy the tied product also. Tie-in arrangements can also be known as the tied sale or tying arrangements.

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<sup>5</sup> Abir Roy & Jayant Kumar (n 1) at 88

<sup>6</sup> *National Society of Professional Engineers v United States* [1978] 435 US 679

<sup>7</sup> Dr. S. C Tripathi, *Competition Law* ( First Edition, 2012) 114

The agencies would be likely to challenge tying arrangements if 1) the seller has market power in the tying product 2) the arrangement has an adverse effect on competition in the relevant market for the tied product 3) efficiency justifications for the arrangements do not outweigh the anti-competitive effects.<sup>8</sup>

### **EXCLUSIVE SUPPLY AGREEMENT**

This is also meant as an exclusive dealing agreement.<sup>9</sup> Under this type of agreement, the seller is under obligation to sell a major part of his products or completely to one buyer under a condition. This acts as a barrier for other competitors to reach out to the products which are required for these business transactions. This is also a kind of anti-competitive agreement.

### **EXCLUSIVE DISTRIBUTION AGREEMENT**

This category embraces sole selling or exclusive sale agencies. The Explanation says that these agreements target to limit or restrict the output of the product.<sup>10</sup>

It can be of two types namely:

**Geographical Basis** - where the seller is under obligation to sell his products to only certain distributors based on the territorial classification.

**Particular Customer Basis** - The seller sells his products only to a certain class of customers based on market allocation.

### **REFUSAL TO DEAL**

As the name says this type of agreement comes into play when the seller refuses to deal with a particular buyer or seller<sup>11</sup>. In the course of business, everyone has their own rights to determine with whom they can have their business transactions. But the refusal to deal with an intention to cause harm or make them suffer with loss is prohibited under the Competition

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<sup>8</sup> Dr Avtar Singh (n 3) at 19

<sup>9</sup> *Ibid* at 20

<sup>10</sup> *Ibid* at 21

<sup>11</sup> *Ibid* at 22

Act of 2002. The Act generally prohibits agreements that took place in a conspiracy. The Consumer Protection, 1986 and the Monopolies and Restrictive Trade Practices Act of 1969 already have the same provisions under the list of unfair trade practices. The Explanation says that these agreements include any activities that restrict or if it is likely to restrict by any method the person or classes of person to whom goods are sold or from whom such goods are bought.

In the case of *Sainik Service Station v Badriprasad Purohit*<sup>12</sup>, it was held that refusal to supply petrol to a person who came to the pump with his vehicle as a consumer was wrong.

### **RESALE PRICE MAINTENANCE**

Resale price maintenance is a kind of illegal agreement that takes place between the manufacturers to the consumers in business transactions. That is the manufacturers pre-determined the cost up to which their products can be sold to the end consumers. It acts as a barrier to the distributor.

### **CARTEL**

Cartels are also anti-competitive agreements which are prohibited by the Competition Act of 2002. As observed by the Supreme Court of India in *Union of India v Hindustan Development Corporation*, a cartel is an association of producers who by agreement among themselves attempt to control production, sales, and prices of products to obtain a monopoly.<sup>13</sup> Cartels are agreements that are entered by the person or group of persons or by the enterprises through which they pre-determine the cost and conditions of the competition. Section 33(1)(d) regards an agreement as restrictive trade practices if such agreements are connected to the purchase or sale of goods only at the pre-determined prices or on the terms and conditions that are agreed upon by the sellers or amongst the purchasers. Such agreements and the act of getting into such agreements are defined as the formation of a cartel. Under the said section there are two classes of agreements. One class is when the prices and the pre-determined conditions are

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<sup>12</sup> *Sainik Service Station v Badriprasad Purohit* (1992) 1 CPJ 432

<sup>13</sup> *Union of India v Hindustan Development Corporation* (1994) CTJ 270 (SC) (MRTP)

agreed upon by or between the purchasers. Another class is when the prices and the conditions are agreed upon by the or between the sellers for the same. In simple words, it can be termed as a buyer's cartel and a seller's cartel also.

Cartels can be further classified into further topics as

***Fixation of prices and the conditions (MRTP Act, repealed)***

This clause comes into play when the sellers decide to fix the price of a product at a higher range.<sup>14</sup> When there is no alternative for such products then the consumers face issues in buying such products. This agreement is also created to raise the brand of their product.

***Restriction on competitive products (MRTP Act, repealed)***

This agreement comes into play when the producers decide to without their output products. This is like creating scarcity for such products and then raising their brand.

***Collaboration Agreements (S.33(1)(g), MRTP Act)***

Any Agreements that are entered into to limit the supply or restrict the free flow of goods based on any area or market for the disposal of goods is called collaboration agreements.<sup>15</sup>

**BID RIGGING**

Bid Rigging is also a type of Cartel. It is also known as collusive tendering or bidding. Bidding takes place when the bidders act in concert as like not bid in reality or have false bidding. That is to say, they fix the winners of the bid and just participate in the real competition that prevails in the markets. It is also an illegal act that is done by the enterprises or group of persons in the market just to win their turn of a bid or gain profit in any other way. Bid rigging is per se illegal irrespective of the fact that it doesn't matter whether the agreement concerns

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<sup>14</sup> Dr Avtar Singh (n 3) at 113

<sup>15</sup> *Ibid* at 125

what the low bid would be, the quantum of the individual bidders bidding, and the bidder who would win the bid.<sup>16</sup>

### EXCEPTIONS UNDER SECTION 3(5)

All the agreements cannot be declared anti-competitive in nature. There are certain cases that have to be exempted for their survival. Such agreements that fall under the exceptions are the agreements that are related to Intellectual Property Rights (IPR). Under section 3 of the act, exceptions are provided. In order to protect their rights over the IP, such exceptions were also provided.<sup>17</sup>

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

All the said acts fall under the exceptions.

### CONCLUSION

As stated earlier competition exists in each field of business. There might be new beginners and also well-established firms in the market. All the competitors are free to enter into agreements with whom they wish to have business transactions. All agreements are not prohibited by the Competition Act of 2002. Only certain agreements that cause harm to other competitors in the field of business are prohibited. It is for the welfare of the competitors. As our Constitution of India declares Equal Opportunity to all in society, there should be equal and fair opportunities for all the competitors in the market. It is mainly to protect the smaller enterprises from the abuse of the largest enterprises in the same market.

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<sup>16</sup> *United States v Mistle Bus & Equipment Co.*, [1992] 967 F 2d 1227

<sup>17</sup> Dr Avtar Singh (n 3) at 34-35