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An Analysis on Anti-Competitive Agreements in India

ADITI GAUTAM[1]

ABSTRACT

The Competition Act, 2002, came in existence with the motive to prevent practices detrimental to competition, promote competition, protect interest of consumers, and ensure free trade. The previous Monopolies and Restrictive Trade Practices Act (MRTP) became outdated and needed to be replaced. The 2002 Act aims to regulate practices that harm competition and replace the MRTP Act. The focus of this paper is on Anti-Competitive Agreements, which are agreements that negatively affect market competition, such as price-fixing, market allocation etc. Section 3 of the competition Act prohibits such kind of agreements and declares them as void. It also states provisions for horizontal anti-competitive agreements and vertical anti competitive agreements. There are some limited exemptions, such as for intellectual property holders. The primary goal of these provisions is to promote healthy competition, benefit consumers and contribute to public welfare.

When Anti-competitive agreements are governed under Section 3 of the Competition Act, 2002[2]. It prohibits any enterprise, association of enterprises, person, or association of persons from entering into agreements regarding the production, supply, distribution, storage, acquisition, or control of goods or the provision of services that cause or are likely to cause an appreciable adverse effect on competition in India. Such agreements are deemed to be void.

An enterprise is defined as any person or government department engaged in activities related to the production, supply, distribution, acquisition, or control of goods or services or dealing with securities. However, it excludes government activities related to sovereign functions like. The term person includes individuals, Hindu undivided families, and various other entities involved in commercial activities. The next step involves discussing the nature of anti-competitive agreements and their implications on the market.

The term agreement is defined in Section 2(b) of the Competition Act[3], which states that it includes any arrangement, understanding, or coordinated action, whether formal or informal, written or unwritten.

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[1] Author is a student at University of Petroleum and Energy Studies, Dehradun, Uttrakhand, India.

[2] The Competition Act, 2002, Act No. 12 of 2003, § 3 (India).

[3] The Competition Act, 2002, Act No. 12 of 2003, § 2(b) (India).

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The next important terms are enterprise and person, as Section 3(1) of the Act[4] prohibits anti-competitive agreements between these entities. Enterprise and person are defined in Section 2(h) and Section 2(l) of the Act as a variety of entities, including companies, firms, associations of persons or bodies of individuals, corporations established by or under any government statute, co-operative societies, local authorities, and any artificial juridical person. Section 2(l) defines person to encompass individuals, partnerships, and other types of legal entities.

The concept of enterprise was discussed in the CLAT Committee case, where the court clarified that a body formed by a Memorandum of Understanding between National Law Universities for conducting an admission test does not qualify as an enterprise under Section 2(h) of the Act. This is because an entity must meet conditions to be considered as an enterprise: it must be a person or a government department, engaged in specified economic activities, and not involved in sovereign activities.

Now, turning to the term anti-competitive agreement, such agreements are those that cause an appreciable adverse effect on competition. The challenge lies in finding what constitutes an appreciable adverse effect on competition. Section 19(3) of the Act outlines factors that the Competition Commission of India must consider in determining whether an agreement causes appreciable adverse effect on competition. For example Creation of barriers to new entrants in the market, Driving existing competitors out of the market, Improvements in the production or distribution of goods or provision of services, Promotion of technical or economic development through production.

Regarding horizontal agreements, Section 3(3) of the Act presumes that any agreement between enterprises, associations of enterprises, persons, or associations of persons that fits the criteria outlined will have an appreciable adverse effect on competition. If these agreements involve practices that restrict competition, they will be viewed as problematic by the Competition Commission. An agreement made by any association of enterprises or persons, including cartels, is considered to fall under anti-competitive behaviour.

Such agreements may involve: Direct or indirect control of purchase or sale prices, Limiting or controlling production, supply, markets, technical development, investment, Sharing markets or sources of production or services through allocations based on geographical areas, bid rigging, which can eliminate competition in bidding processes.

The proviso to this section clarifies that such provisions do not apply to joint venture agreements that enhance efficiency in production, supply, distribution, storage, acquisition, or control of

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[4] The Competition Act, 2002, Act No. 12 of 2003, § 3 (1)(India).

goods or services. In these cases, the accused carries the burden of proof, and it is presumed that such an agreement leads to an appreciable adverse effect on competition.

Cartels are specifically addressed under Section 3(3) of the Act. Cartels are horizontal agreements (between entities at the same level in the production chain) and are defined under Section 2(c) as associations of producers, sellers, distributors, traders, who, through mutual agreement, limit or control production, distribution, sale, or pricing of goods or services. Cartels are known to have a harmful impact on market competition.

In the case *Builders Association of India v. Cement Manufacturers' Association & Ors.*[5], the Competition Commission of India found that the Cement Manufacturers Association was used as a platform for cartelization, where cement prices were fixed, and production and supply were controlled. Information regarding costs, prices, and production process was exchanged, and cement manufacturers raised prices after association meetings, indicating coordinated efforts. The CCI also noted that market conditions led to reduced production that was not based on market demand. The CCI found that the cement manufacturers formed a cartel, violating the provisions of the Competition Act and imposed a penalty.

In another case the *Sonam Sharma v. Apple & Ors.* case[6], the CCI held that there must be two distinct products, and the sale of one must be conditional on the purchase of the other. The seller must have significant market power over the tied product, allowing them to force the buyer into purchasing the tied product. The arrangement must affect a substantial portion of commerce.

Exclusive Supply Agreements: These agreements restrict a purchaser from acquiring goods from anyone other than the seller.

Exclusive Distribution Agreements: These agreements limit the supply of goods within certain areas or markets.

Refusal to Deal: These agreements restrict or are likely to restrict the individuals or classes of people to whom goods are sold or from whom goods are purchased.

Resale Price Maintenance: This involves agreements that dictate the resale price of goods, stating that the prices charged by the purchaser when reselling the goods must meet or exceed prices set by the seller, though lower prices may be allowed in some cases

The influence of buyers in setting prices was widespread, and the parallel pricing behaviour observed was not the result of coordinated actions.

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[5] 2012 CompLR 629 (CCI)

[6] Sonam Sharma v. Apple Inc. USA & Ors., Case No. 24 of 2011 (Competition Comm'n of India, Mar. 19, 2013)

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Vertical Agreements: These are agreements made between businesses at different levels of the production or supply chain, such as between a manufacturer and a distributor. Section 3(4) of the Competition Act addresses vertical agreements, stating that any agreement between entities at different stages or levels in the production chain regarding the production, supply, distribution, storage, sale, price, or trade of goods or services is considered anti-competitive if it causes or is likely to cause an appreciable adverse effect on competition in India. This includes:

Tie-in Arrangements: These require a purchaser to buy one product as a condition of purchasing another., *Rajasthan Cylinders and Containers Ltd. v. Union of India*[7], the Supreme Court ruled that although bidders quoted identical prices and attended the same trade association meetings, there was no evidence of collusion. The Court found that the parallel pricing resulted from an oligopsony (a market situation with few buyers) rather than collusion. The suppliers of LPG cylinders were found to have engaged in bid rigging due to the identical pricing in their tender submissions, but the Court ruled that this pricing behaviour was driven by market conditions rather than coordinated actions.

In the *Shamsher Kataria v. Honda Siel Cars India Ltd. and Others* case[8], the Competition Commission of India examined exclusive supply agreements, exclusive distribution agreements, and refusal to deal. The case involved allegations that the opposite parties had engaged in anti-competitive practices by restricting the availability of genuine spare parts in the market. The original equipment manufacturers had clauses in their agreements requiring authorized dealers to only source spare parts from them or their approved vendors, effectively limiting the free availability of spare parts. The CCI found that these agreements resulted in exclusive distribution agreements and refusal to deal, which contravened Section 3(4)(c) and 3(4)(d) of the Act. The Commission concluded that these practices, whether through specific agreements or informal understandings, restricted the sale of spare parts, thus violating competition law. Agreements were determined to be exclusive supply agreements under Section 3(4)(b) of the Act.

In the case of *Fx Enterprise Solutions India Pvt. Ltd. and Hyundai Motor India Limited*[9], the Commission concluded that by setting both the maximum resale price and the maximum discount allowed for customers, Hyundai had effectively set a minimum resale price. The

[7] AIRONLINE 2018 SC 736
[8] Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors., Case No. 03 of 2011 (Competition Comm'n of India, Aug. 25, 2014)
[9] Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd., Case Nos. 36 & 82 of 2014 (Competition Comm'n of India, June 14, 2017).

Commission found Hyundai in violation of Section 3(4)(e) read with Section 3(1) of the Competition Act, 2002 due to arrangements leading to Resale Price Maintenance. The Commission also found that Hyundai had violated Section 3(4)(a) read with Section 3(1) by making it mandatory for dealers to use only their recommended lubricants, with penalties for using alternatives. However, the National Company Law Appellate Tribunal overturned this decision, arguing that the CCI had relied solely on the Director General's report without conducting a proper inquiry under Section 27 of the Act. The NCLAT also noted that the CCI failed to consider factors under Sections 19(6) and 19(7) related to determining the relevant geographic and product markets.

In *Director General, Department of Commerce v. M/s Puja Enterprises*[10], the Director General filed a complaint alleging bid rigging and market allocation under Section 3 of the Competition Act. The Commission found that the bidders had colluded by quoting nearly identical rates, indirectly determining prices and engaging in bid rigging. The Commission also noted that by imposing quantity restrictions, the bidders had attempted to control the supply and allocate markets among themselves, violating various sections of the Act. However, Section 3(4) did not apply because the parties were not at different levels in the production chain.

Section 3(5) of the Act offers a limited exemption, stating that anti-competitive provisions under Section 3 do not apply to reasonable conditions necessary for protecting intellectual property rights. The CCI has listed practices that may contravene Section 3, even if they are intended to protect IPR, including:

- Patent Pooling: A practice where firms restrict licensing to third parties.
- Tie-in Arrangements: Requiring a licensee to acquire certain goods solely from the patentee.
- Perpetual Royalties: Agreements requiring royalty payments even after the patent expires.
- Restricting R&D: Limiting research and development or prohibiting the use of rival technology.
- Not Challenging IPR Validity: Agreements preventing the licensee from challenging the validity of the IPR.
- Grant Backs: Requiring the licensee to grant any acquired IPR back to the licensor.
- Resale Price Fixation: Setting the price at which the licensee must sell goods.

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[10] Director General (Supplies & Disposals), Dep't of Commerce v. M/s Puja Enterprises & Ors., Ref. Case No. 01 of 2012 (Competition Comm'n of India, Aug. 5, 2013).

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- Territorial Restrictions: Limiting where or to whom the licensee can sell.
- Package Licensing: Coercing the licensee into accepting multiple licenses, even if not needed.
- Excessive Quality Control: Imposing unnecessary quality controls on the licensed product.
- Field of Use Restrictions: Limiting the licensee's right to sell to specific parties.
- Imposing a Trademark: Restricting the licensee's choice of trademark.
- Indemnity for IP Infringement: Requiring the licensee to indemnify the licensor for IP infringement.
- Undue Restrictions: Imposing unreasonable business restrictions on the licensee.
- Limiting Output: Restricting how much the licensee can use the patented invention.
- Recruitment Restrictions: Imposing conditions on the licensee to employ or use staff designated by the licensor.

In *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*[11], the Supreme Court addressed the conflict between competition law and intellectual property rights. The Court emphasized that while copyright holders have a monopoly, this monopoly is not absolute, and if it disrupts market functioning, it may violate competition law, especially in cases like refusal to license. The Court affirmed that IPR holders can earn royalties but must not engage in practices that harm competition.

Section 19(1) of the Act allows the Competition Commission of India to investigate any alleged contravention of Section 3(1) either on its own initiative or based on information from any individual, consumer, or their association. The CCI may also act on referrals from the central or state governments or statutory authorities. The CCI will only proceed with an inquiry if there is a prima facie case. If the CCI finds an agreement to be anti-competitive and to have an appreciable adverse effect on competition, it may issue the following orders, in addition to any interim orders under Section 33: Direct the parties to cease the agreement and prevent its re-entry. Impose a penalty of up to 10% of the average turnover of the last three financial years for each party involved. In cases involving a cartel, impose a penalty of up to three times the profit for each year the cartel continues or 10% of the annual turnover.

The Competition Act, 2002 was enacted by the Government of India to address issues related to market competition, promote fair business practices, and protect consumer interests. This law is a significant tool to prevent and penalize anti-competitive conduct by enterprises and

[11] Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., (2008) 13 SCC 30 (India).

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individuals that adversely affect market dynamics.

The essence of the Competition Act is to foster an environment where businesses can thrive, competition can flourish, and consumers can enjoy the benefits of a competitive market, including better products, lower prices, and innovation. The primary objectives of the Competition Act, 2002 are as follows:

- **Prohibition of Anti-Competitive Agreements:** The Act aims to curb agreements that distort or restrict competition in the market, such as price-fixing, bid-rigging, and market allocation. These types of agreements harm consumers and reduce the overall efficiency of the economy
- **Promotion of Competition:** The Act seeks to encourage healthy competition among businesses, ensuring that they are incentivized to innovate, improve products and services, and lower prices.
- **Protection of Consumer Welfare:** Consumers play a central role in the Competition Act. By ensuring competition in the marketplace, the Act indirectly protects consumers by making goods and services available at competitive prices and of higher quality.

The Competition Act also regulates mergers, acquisitions, and amalgamations that may substantially reduce or distort competition in the market. It requires companies to seek approval from the Competition Commission of India if they meet certain thresholds for asset size or turnover.

Promoting Fair Business Practices: The Act aims to prevent business practices that can lead to monopolistic behaviour, unfair trade practices, and other activities that harm fair competition.

One of the most crucial sections of the Competition Act is Section 3, which specifically deals with the prohibition of anti-competitive agreements. Section 3(1) prohibits any agreement between enterprises, individuals, or associations that causes or is likely to cause an appreciable adverse effect on competition in India. These agreements can either be horizontal or vertical.

Section 3 of the Act primarily focuses on anti-competitive agreements, which can broadly be classified into the

- Horizontal Agreements: Horizontal agreements are arrangements between competitors, typically at the same level of the production or supply chain. These agreements result in the restriction of competition and are harmful. Examples of horizontal agreements include:

- Price Fixing: Competitors agree to set the prices of goods or services at certain levels, eliminating price competition.
- Bid-Rigging: Competitors collude to manipulate the outcome of a tender or bidding process, thereby reducing the competitive nature of the market.
- Market Sharing: Competitors agree to divide markets geographically, thus reducing the level of competition.
- Production or Supply Control: Competitors may agree to limit the production or supply of goods or services, artificially creating scarcity and driving up prices.

These kinds of agreements are considered per se violations, meaning that they are harmful to competition by their very nature, and no further evidence of anti-competitive effects is needed to prove their illegality.

Vertical Agreements: Vertical agreements are those between entities at different levels of the production or supply chain, such as agreements between manufacturers and distributors or wholesalers and retailers. While these agreements are not automatically presumed to harm competition, they can still have anti-competitive effects depending on their nature. Examples of vertical agreements include:

- **Tie-in: Arrangements:** Where a seller requires the buyer to purchase additional goods or services as a condition of purchasing the main product.
- **Exclusive Supply Agreements:** Where a buyer is restricted from purchasing from other suppliers.
- **Exclusive Distribution Agreements:** Where a supplier limits the number of distributors or restricts the area in which goods may be sold.
- **Resale Price Maintenance:** Where a seller fixes the resale price at which a product can be sold, limiting the distributor's freedom to set prices.

Vertical agreements are looked upon more carefully to determine whether they cause significant harm to competition or whether they contribute to efficiencies in the market, such as lowering costs or improving product quality.

Anti-Competitive Practices in Combinations: The Act also regulates combinations (mergers, acquisitions, and amalgamations) to ensure that they do not lead to reduced competition in the market. If a combination is likely to have an appreciable adverse effect on competition, the parties involved are required to seek prior approval from the Competition Commission of India. The CCI evaluates the impact of these combinations on market competition, considering factors like market share, the level of competition in the market, and the potential for consumer harm.

The Competition Commission of India is the primary body responsible for enforcing the provisions of the Competition Act, 2002. It has wide-ranging powers to investigate and act against anti-competitive practices, either on its own initiative or in response to complaints. The CCI has the authority to:

- Investigate Anti-Competitive Practices: The CCI can investigate agreements and practices that harm competition in the market. It can inquire into cases of cartelization, abuse of dominance, and anti-competitive mergers and acquisitions.
- Impose Penalties: The CCI can impose penalties on entities found to be in violation of the Competition Act. These penalties are typically calculated as a percentage of the turnover of the offending party. For cartels, the penalty may be as high as three times the profit made from the illegal conduct.
- Issue Orders for Cease and Desist: The CCI can issue orders requiring parties to cease from engaging in anti-competitive practices. It can also mandate changes in business practices or require the modification of agreements that violate competition law.
- Advise the Government: The CCI also advises the government on policy matters related to competition, such as the formulation of regulations that may impact market competition.

Consumer awareness is a critical component of the Competition Act, as the law is ultimately designed to protect the interests of consumers. When consumers are aware of their rights and the functioning of the market, they are better equipped to identify when they are being harmed by anti-competitive behaviour, such as price-fixing, collusion, or unfair trade practices. Moreover, consumer awareness helps in creating demand for competitive and innovative products and services, which in turn forces businesses to improve and stay competitive.

The Act’s focus on consumer protection through competition aligns with the broader goal of ensuring that businesses operate fairly. Consumers benefit from lower prices, improved quality, and greater choice in a competitive market. In turn, businesses that engage in anti-competitive behaviour, such as cartelization or price-fixing, undermine consumer interests and market efficiency.

For businesses operating in India, compliance with the Competition Act, 2002 is crucial. Engaging in anti-competitive behaviour not only exposes a business to significant financial penalties but also damages its reputation and consumer trust. Businesses must ensure that their agreements, practices, and strategies are in line with competition laws to avoid the risk of legal action from the CCI. Moreover, businesses can benefit from the competitive environment

promoted by the Act. A market characterized by healthy competition fosters innovation, efficiency, and growth. By focusing on improving products, reducing costs, and serving consumers better, businesses can thrive without resorting to anti-competitive practices.

Conclusion

The Competition Act, 2002 plays a holistic role in maintaining fair competition in India's economy. By prohibiting anti-competitive agreements and practices, the Act ensures that businesses compete on a level playing field and that consumers are protected from unfair practices. As the Act continues to evolve, its focus on creating an open, competitive marketplace remains central to India's economic growth and progress.

For businesses, adhering to the provisions of the Competition Act is not just a legal requirement but also an opportunity to foster a healthy, competitive business environment. Companies must always assess their business practices to ensure they are free from anti competitive elements and contribute to a fair and efficient market that benefits both consumers and the economy.