ANTI-COMPETITIVE AGREEMENTS – A GENERAL UNDERSTANDING

An agreement in respect of the production, supply, distribution, storage, acquisition or control of goods or the provision of services, which causes or is likely to cause an "appreciable adverse effect on competition" within India, is defined as an 'anti-competitive agreement'. The Act prohibits anti-competitive agreements and declares that such agreements shall be void. However, the prohibition contained in Section 3 is not absolute and permits joint venture agreements where certain parameters are met.[1] Anti-competitive agreements can be 'horizontal' (agreements between direct competitors), 'vertical' (agreements between enterprises at different levels of the production chain in different markets, such as agreements between a manufacturer and a distributor or a distributor and a retailer) or both.

The principal objective of supplier of goods and services who are in a position to manipulate the market is to maintain their profits at pre-determined levels. They seek to achieve this through various means. Agreements for price-fixing, limiting supply of goods or services, dividing the market, etc. are the usual modes of interfering with the process of competition and ultimately reducing or eliminating competition. Where competition is adversely affected to an appreciable extent, such agreements would be anti-competitive.

Section 3, Competition Act 2002 – Anti-Competitive Agreements

The law prohibiting agreements, practices, and decisions that are anti-competitive is contained in section 3 of the Act.

Substance/Components of Section 3

a) Prohibition generally of anti-competitive agreements in respect of the supply of goods and services that cause or are likely to cause appreciable adverse effect on competition in India (sub-sec.1);

b) The declaration that such agreements in contravention of that sub-section are void (sub-sec.2);

c) Any agreement or a practice or a decision to which enterprises which are engaged in the supply of identical or similar trade of goods or provision of services, which would include cartels, are parties, which determines any of the following shall be presumed to have an appreciable adverse effect on competition:

   i. The prices at which the goods may be sold or the services provided; price fixing may be done directly or indirectly;

   ii. Limiting or controlling any of the following i.e.: the production, supply of goods or services, or markets, or technical developments or investment;

[1]The proviso to Section 3(3) of the Competition Act

iii. Sharing the market or source of production or provisions of services. The partitioning of the market i.e. deciding the customers who may be able to buy, or the decision who shall supply where, either goods or services, may be done by allocation of a geographic area of the market for supply, or by deciding on the type of goods or services that are to be offered or the number of customers in the market to be served.

d) Bid rigging or collusive bidding, whether done directly or indirectly; the proviso to sub-section 3 exempts joint venture agreements if they increase efficiency in production, supply or control of goods or provision of services.

e) Vertical restraints in trade some of which are expressly set out in the Act, but are not exhaustive, shall be a contravention of the prohibition, if an agreement stipulating to any such restraint causes or is likely to cause appreciable adverse effect on competition in India; they are to be examined under the rule of reason (sub.sec.4);

f) The entire Sec. 3 will not apply to any restriction that the owner of intellectual property rights under any of the specified enactments set out in sub. sec. 5 may impose in the exercise of his rights, to restrain infringement of any of his rights 5 (i), or to the right of any person to export goods from India under the conditions stated in sub-section 5 (ii).

Horizontal And Vertical Agreements

Anti-competitive agreements can be 'horizontal' (agreements between direct competitors), 'vertical' (agreements between enterprises at different levels of the production chain in different markets, such as agreements between a manufacturer and a distributor or a distributor and a retailer) or both.

***Horizontal agreements include*:**

- agreements to fix prices;
- agreements to limit production, supply, markets, technical development, investments or provisions of services;
- agreements to allocate markets or the source of production or provision of services through the allocation of, for example, geographical area, type of good or service or the number of customers; and
- bid rigging or collusive bidding.

These horizontal agreements are presumed to have an appreciable adverse effect on competition, which is similar to the per se rule. The 'cartel' is the most pernicious form of horizontal agreement and has been defined as an association of producers, sellers, distributors, traders or service providers which, by an agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of or trade in goods or the provision of services.

***Vertical agreements include*:**

- tie-in arrangements;
- exclusive supply agreements;
- exclusive distribution agreements;
- refusal to deal; and
- resale price maintenance.

However, such arrangements are common business practices and infringe the law only if they reduce competition. The five above-mentioned categories of vertical agreement have the potential for foreclosing competition by hindering the entry of new players into the market and hence may be considered anti-competitive.

Anti-Competitive Agreements under USA, EU and UK Competition Law Regimes

a) Competition Law of the US

The key provisions of the Sherman Act are contained in section 1 and section 2 which are respectively analogous to Article 101 and 102 of the EU treaty. Section 1 of the Sherman Antitrust Act describes precisely and prohibits specific means of anti-competitive conduct. It prohibits agreements in restraint of trade such as price-fixing, refusals to deal, bid-rigging, etc. The parties involved might be competitors, customers, or a combination of the two. Although the law states that every contract, combination, or conspiracy in restraint of trade is declared to be illegal, it has been interpreted by the courts to mean every contract, combination, or conspiracy unreasonably in restraint of trade. Section 2 of the Sherman Antitrust Act deals with end results that are anti-competitive in nature and forbids monopolizing or attempting to monopolize. Basically it prohibits firms from using bad conduct or abusive behavior to become a monopolist or using such behavior if they're already a monopoly. Notice that it does not prohibit firms from being a monopoly. It only forbids the use of monopolistic power. Thus, these sections supplement each other in an effort to prevent businesses from violating the spirit of the Act, while technically remaining within the letter of the law.

***Competition Law of the European Union ("EU")*[2]**

Section 3(1) dealing with anti-competitive agreements and section 4 dealing with abuse of a dominant position, of the Act, are based largely on the model of the law of the EEC relating to antitrust, viz. Articles 81 and 82 (now 101 and 102 respectively). Article 81 of the Treaty of Rome is the law regulating anti-competitive agreements in the EC. Article 82 deals with abuse of a dominant position. Though the decisions under those Articles are not binding on the authorities in India, they are useful guides in understanding the intent of the legislation. The fact that the primary

[2] The pervious name 'European community' was replaced by 'European Union' by the Treaty of Lisbon, which was signed on 13 December 2007 in Lisbon and which entered into force on 1 December 2009.

goal of the Treaty of Rome is stated as to integrate the EC into a common market and not to protect competition, as such, as in the US, should not also make any difference in considering the logic of the EC decisions.

Article 81 of the EC Treaty (previously Article 85) prohibits agreements between undertakings that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Article 81 lists the following as prohibited as incompatible with the Common Market:

a) price-fixing agreements;

b) those that limit or control production, markets, technical development, or investment or share markets or sources of supply;

c) agreements that impose dissimilar conditions to equivalent transactions, placing trading parties at a disadvantage; and

d) agreements that place the other party to the contract under supplementary obligations commercially unrelated to the subject of the contract.

The list of prohibited agreements is illustrative and not exhaustive. A prohibited agreement is automatically void. Article 81(3) exempts certain categories of agreements from Article 81(1) subject to certain qualifications that remove the anti-competitive nature of the agreement. An agreement is exempted if it contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. This is subject to the proviso that the agreement also does not impose unrelated restrictions on the undertakings concerned and also does not enable the undertaking to eliminate competition in respect of a substantial part of the products in question[3].

b) The Competition Act, 1998, UK[4]

The principal domestic law relating to competition in the UK is the Competition Act, 1998. The Enterprise Act, 2002, is complementary to their Competition Act. Section *2* of the UK Competition Act, deals with anti-competitive agreements, decisions and concerted practices. Section 2(1), subject to section 3 prohibits, unless they are exempt in accordance with the provisions of Part I, 'agreements between undertakings, decisions by associations of undertakings or concerted practices which—(a) may affect trade within the UK, and (b) have as their object or effect the prevention, restriction or distortion of competition within the UK'. They are broadly the same as set out in Article 81, as according to section 60 of the Competition Act, 1998, the domestic law in the UK relating to competition should be consistent with the treatment of corresponding questions arising in Community law in

[3] Book on **Competition law in India – Policy, Issues and Developments**, Third Edition 2014, Pg. 75 & 76authored by T.Ramappa
[4] Book on **Competition law in India – Policy, Issues and Developments**, Third Edition 2014, Pg. 77authored by T.Ramappa

relation to competition within the Community. Any issue relating to the effect on competition with a Community Dimension will be dealt with in accordance with the European Community law, viz. Articles 81 and 82 of the EEC Treaty. The Act grants individual exemptions, under section 4, block exemptions under section 6, when the criteria under section 9 are met. A parallel exemption may be available where the agreement has been exempted under Article 81(3).

Thus, any agreement which may cause an adverse effect on competition in the relevant market in India is likely to be challenged before the Competition Commission and, if proved to violate Section 3, declared null and void and hence legally unenforceable. Since such agreements are private agreements, they are unlikely to be known to the outside world, except either when any of the parties to the agreement chooses to file a complaint or when a third party likely to be affected by such agreement (e.g. customers or consumers) chooses to challenge the agreement before the commission. Therefore, it is advisable to have these agreements examined to reduce the possibility of a challenge.