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Indian Anti-Competitive Agreements: An analysis

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ABSTRACT

A legally binding agreement known as an anti-competitive agreement requires a party (often an employee) to refrain from engaging in specific competitive activities for a predetermined amount of time following the termination of their employment or business relationship. Anti-competitive agreements are frequently used to safeguard a company's trade secrets, sensitive information, and other proprietary information. The judicial system is frequently used to enforce anti-competitive agreements. A person who violates the conditions of an anti-competitive agreement may be sued by the corporation in order to get an injunction stopping them from carrying out the illegal conduct. The person will not be allowed to carry out the designated activity until the injunction is removed or the anti-competitive agreement expires if it is granted.

Anti-competitive agreements aren't always upheld, though. An anti-competitive agreement must be reasonable in scope and duration, as well as necessary to safeguard the company's legitimate economic interests, in order to be upheld in court. An anti-competitive agreement might not be upheld by a court if it finds that it is too restrictive or is not required to safeguard the company's interests. Anti-competition agreements can be a helpful tool for safeguarding a business's proprietary information and competitive advantage overall, but it's critical to make sure they are reasonable and enforceable.

Keywords: Anti-competitive agreements, Protection of consumers, Appreciable adverse effect on competition, E-commerce, Privacy

INTRODUCTION

The Monopolies and Restrictive Trade Practises Act, 1969 (the "MRTP Act") was repealed by the Competition Act, which replaced it with a new framework for Indian competition law based on the experience of competition law in some advanced jurisdictions, such as the European Union, and the perceived shift in India's economic and business environment. The Competition Act gave the CCI a larger role and more robust punitive powers than the former Monopolies and Restrictive Trade Practises Commission, in addition to the fact that there were notable differences between the substantive prohibitions of the MRTP Act and the Competition Act.

Due to a free and open market economy, the competition act prevents several discrepancies and anomalies that could occur from unfair business practises. An example of this disparity is the use of anti-competitive agreements. As the National Consumer Disputes redressel Commission has noted that Exploitation of the borrower or debtor is illegal and is regarded as an unfair trading practise in all

economies, free or otherwise. A free economy would not be an excuse to take advantage of debtors by exploiting their basic requirements for survival. Any civilised society except perhaps one with a deregulated free market economy cannot permit this. This article mainly focuses on Section 3 of the Competition Act which sets out the substantive prohibitions on anti-competitive agreements, which also highlights certain variations between its provisions and those of the Competition Act and examines a few significant CCI rulings on matters pertaining to Section 3 of the Competition Act.

ANTI-COMPETATIVE AGREEMENTS:

Section 3 speaks about anti-competitive agreements. According to Section 3 (1), any agreements pertaining to the manufacture, supply, distribution, storage, purchase, or control of goods or services that have a noticeable unfavourable effect on the competition must be made within India. Section 3 (2) states that the agreements shall be null and void with reference to this provision. The Act further differentiates the anticompetitive agreements into two categories- The first category covers the agreements emanating from the collective action of a group of persons engaged in the same line of business activity referred to as 'Horizontal agreements' Section 3 (3), second category covers the agreements emanating from actions between enterprises or persons at different stages or levels called as 'vertical agreements, Section 3 (4).

Horizontal agreements defined under Section 3 (3) are basically between or decision taken by any person or association of persons or association of enterprise engaged in identical or similar trade of goods or services. In other words, it is like cartels or concerted actions in nature, which envisages the uniformity or harmonization of the market behaviour of a group of competing producers or suppliers. The common forms are price-fixing, limiting production and supply, allocating share or sales quota, engage in an appreciable adverse effect on competition. These agreements are per se anti-competitive. These agreements are always subjected to the 'Rule of reason[1]'.

For example, Uber and Ola, came up with agreements like minimum and a maximum charge of the ride per kilometre or sharing the areas for riding cars, only Ola can cover the Koramangala and Uber can cover the Tavarekere, or only from morning Ola and evening uber, these kinds of the agreements are the perfect example for the horizontal agreements. Presumption of the illegality of horizontal agreements- for certain kinds of agreements the presumption is often that they cannot serve any useful or procompetitive purposes and therefore do not need to be subject to the 'rule of reason test.

The following kinds are often presumed to be anti-competitive:

- Agreements regarding prices- this would include all agreements that directly or indirectly fix the purchase or sale price.
- Agreement regarding quantities- this includes agreements aimed at limiting or controlling production and investment.
- Agreement regarding bids- this includes tenders submitted as a result of any joint activity or agreement.
- Agreement regarding market sharing- it includes agreements for sharing of markets by territory, type or size or customer, or in any other way[2].

[1] Horizontal agreements and their types http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/03._competition_law/10._horizontal_agreements_and_their_types/et/8133_et_et.pdf

[2] Anti competitive agreements, https://www.cliffsnotes.com/file/188952886/Anti-Competitive-Agreementsdoc/

Vertical agreements are defined under Section 3 (4) of the Act, which says that if an agreement is entered between different levels or different stages of the chain of the products from different markets, in respect of production, supply, distribution, storage, sale or price of or trade-in provision of services called vertical agreements. The common forms of such agreements are:

- Tie-in arrangements,
- Exclusive supply,
- Exclusive distribution,
- Refusal to deal, and
- Resale price maintenance[3].

If such an agreement causes or is likely to cause an appreciable adverse effect on the competition in India, it shall be void. Under the 'rule of reason', vertical agreements are treated more leniently than horizontal agreements. This is because vertical agreements can perform pro competitive functions. For example, if Make My Trip leading online travel company, and Oyo online hotel booking entered into an agreement that is working at different stages and in different markets. The confidential agreements said that, Make My Trip will not be listing the Treebo and Fab hotels who are competitors to the Oyo in the Make My Trip list. The Competition Commission of India in *Rubtub Solutions Pvt. Ltd. And MakeMyTrip India Pvt. Ltd. (MMT)*[4] held that this vertical agreement violates Section 3 (4) (d) which says that refusal to deal.

Appreciable adverse effects on the competition

The important essential aspect to call the agreement the anti-competitive agreement, it must cause an appreciable adverse effect on the competition. Then what is the meaning of AAEC? The questions if facts have to be decided;

- Whether there is competition
- Whether there is any adverse effect on competition and
- That adverse effect is 'appreciable'[5].

The elements that go necessary into deciding whether or not there is an appreciable adverse effect on competition.

Anti-competitive agreements:

- 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

Pro-competitive agreements:

- accrual of benefits to consumers
- Improvements in production or distribution of goods or provision of services; or
- Promotion of technical, scientific, and economic development using production or distribution of goods or provision of services.

[3] Competition Act, Section 3 (4), No.12, Act of Parliament, 2002 (India).
[4] CCI Case No. 01 of 2020
[5] ADI P. TALATI, NAHAR S. MAHALA, COMMERCIAL'S COMPETITION ACT, 2002 LAW, PRACTICE & PROCEDURE 42 (Commercial Law Publishers (India) Pvt. Ltd 2006).

In *Mohit Manglani v. Flipkart & ors*[6]., The Competition authority acknowledges the "pro-competitive benefits of e-commerce platforms. E-commerce platforms, according to the Commission, provide platforms those consumers with the ability to research costs, as well as the benefits and drawbacks of products, and the option of having them delivered straight to their homes. Consumers can make the order at their ease and do not have to wait for several hours to buy a product at a brick-and-mortar store. As a result, it appears that the exclusive agreement between producers and e-commerce sites doesn't really contribute to an Appreciable adverse effect on the market at present time."

RULE OF REASON:

Under the Rule of Reason, the impact of competition is determined by the details of the case, the marketplace, as well as the prevailing competition, as well as any current or potential limitation on competition. Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement[7] was the case where the Supreme Court of India interpreted the rule of reason. It was decided that "three factors should be considered to answer the question:

(a) What facts are unique to the business for which the restriction is imposed.
(b) What was the situation before and after the restraint was imposed,
(c) What is the essence of the limitation and what is its real and likely effect.

In the case of the rule of reason test, the pro-competitive effects are balanced with the anti-competitive effects, and after that, if the pernicious effect is considered higher the activity is prevented by the competitive agency of the respective jurisdiction[8].

EXCLUSIVE AGREEMENTS:

Exclusive agreements are not necessarily anti-competitive because some of them have the ability to provide value to customers, such as enhancements in service manufacturing, or the advancement of technological, intellectual, and economic progress. However, it does not always lead to a positive outcome, some of them raise significant issues to the competition, it is necessitating the attention of Competition regulatory agencies.

The exclusive agreements may raise significant competition issues:

- When implemented as an exclusionary strategy to keep competitors out or obstruct entry. If there is inadequate competitiveness either in the systems' marketplace or even the marketplace where sellers/service providers compete would raise such concerns.
- Exclusive agreements may cause competing platforms to invest huge additional expenses to persuade brands and service providers to drop their exclusive contracts with the big platform.
- When a platform lists only one brand/service provider in a certain product line, it can be difficult for competitor brands/service suppliers to just get their items in front of consumers.

[6] CCI Case No. 80 of 2014
[7] (1977) 47 Comp Cas 520 SC
[8] Dr. Souvik Chatterj, Indian Competition (Amendment) Act, 2007 Has Not Made Difference Between Per Se Rule And Rule Of Reason 1 ICLR 60, 62-63 (2019), http://iclr.in/wpcontent/uploads/2019/08/Vol.1INDIAN-COMPETITION-AMENDMENT-ACT-2007-HAS-NOTMADE-DIFFERENCE-BETWEEN-PER-SE-RULE-AND-RULE-OF-REASON-.pd

- Exclusive agreements compel users to buy things from these particular digital platforms' websites exclusively, regardless of the amount or availability of substitute items. it leads to limiting the consumer's opportunity to purchase the very same item on different digital platforms.

Mohit Manglani v. Flipkart & Ors[9]., various e-commerce companies alleging anti-competitive impact arising out of the 'exclusive agreements' between ecommerce websites and sellers for selli selected products exclusively on the selected portals to the exclusion of other e-portals or physical channels or through any other physical channel. Informants alleged that such practice of entering into an exclusive agreement for the sale and purchase of goods by way of e-commerce is violating the provisions of sections 3(1), 3(4) (b) & (c). According to the competition commission, consumers get the alternative of purchasing the goods at their free time and do not need to stand for a couple of hours at a stretch to buy through a brick-and-mortar retail establishment. Consumers through e-commerce platforms get more opportunities to compare the price of the products, the good and bad of the product, and finally get the delivery of the product at their home. As a result, it appears that the exclusive agreement between manufacturers and e-commerce platforms does not lead to an Appreciable adverse effect on the competition at present time.

Rubtub Solutions Pvt. Ltd. And MakeMyTrip India Pvt. Ltd. (MMT)[10] case, Treebo had been listing its budget hotels on other OTAs platforms such as MMT, MMT asked the Treebo to enter into an 'Exclusivity Agreement' with MMT.

DEEP DISCOUNTS:

Discounts result in cheaper costs and might be the result of a variety of cost reductions. Moreover, digital platforms are well-known for prioritizing expansion of business above profitability by subsidizing consumers through low price tactics. Platform discounts are often considered a way for platforms to build network effects for customer engagement in the early years. Discounts, on the other hand, can be harmful to competition if they are utilized as an exclusionary tactic by businesses with market dominance.

In an E-commerce market study conducted by the Competition Commission of India, there are three main reasons why vendors, consumers, and providers are concerned about discounts given on or by digital platforms:

1. Discounts are discriminative,

2. Discounts placed by platforms in the exercise of their own greater market power have a negative impact on service providers' business,

3. Discounts drive prices below cost in some market segments, hampering the capacity of brick-and-mortar and offline independent retailers to stay competitive.

Deep discounts may raise the significant competition issues like-

- The provider may lose the power to decide the final price to the consumers when intermediate digital platforms give discounts beyond the price set by the service provider. According to reports, the

[9] CCI Case No. 80 of 2014.
[10] CCI Case No. 01 of 2020.

platforms discounts are so large that service providers are unable to profitably match them in traditional means of booking.

- This generates an artificial price discrepancy and pushes users to digital platforms, leading to a greater reliance on these gateway channels by service suppliers.
- This could result in a lasting loss of value for their items, as well as a weakening of their market position.
- Businesses commit to such schemes because they are reliant on platforms and fear a negative impact on their search list if they do agree to such schemes.
- In certain product categories, such as cell phones and electronic/electrical equipment, e-commerce platforms are selling products at below-cost prices, reducing brick-and-mortar merchants' ability to compete in the market.

Meru Travel Solutions Pvt. Ltd. And M/s ANI Technologies Pvt. Ltd., M/s Uber India Systems Pvt. Ltd[11] informants alleged that opposition parties entered into agreements with drivers with deep discounting and employed an incentive model business so that drivers are locked into one network. Further informants alleged that such agreements aimed at foreclosing the competition,

CONCLUSION

The Competition Act of 2002, which is well-defined and specialised, replaced the MRTP Act, which was ambiguous. This marks a number of improvements to India's competition law. The competitiveness Act of 2002 is currently in place and has a solid base, despite being new and in its infancy. The legislation has specifically addressed many technical issues and included them, eliminating any potential ambiguity or gaps. The Act goes into great detail about the idea of an anticompetitive agreement. With such measures, the Act seeks to safeguard consumer interests, promote a self-regulatory, healthy market economy, and improve the environment for competition among market participants. As a result, the law's external aspects have been given adequate and sound protection. Together, Sections 3(1), (3), and (4) and Section 19(3) define anti-competitive agreements and the causes of AAEC. The act aims to define whether such agreements are to be assumed illegal per se or whether the rule of reason is to be employed before declaring the agreement to be illegal based on these factors.

The performance of the CCI could be improved in a number of areas, most notably in the area of decision-making clarity and the justifications for rejecting opposing views, as is to be expected in the early stages of any body of law. This is significant not only for the pertinent issue at hand but also to improve public knowledge of the legal system given the early stages of development of competition law in India.

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