

ANALYSIS OF TIE IN AGREEMENTS UNDER COMPETITION LAW

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ABSTRACT

Under the Competition Act, Tie-in arrangement is managed under the head Vertical Anti-Competitive Agreement. A tie-in arrangement, under this Act, isn't unlawful in essence yet in the event that it has an obvious antagonistic impact on the competition, at that point it winds up illicit. Tie-in arrangements have both great and terrible consequences for the competition. On one hand tie-in arrangements may result in value discrimination, boundaries to new section in the market, imposing business model of the tied and tying items. Then again tie-in arrangement may profit the customers by providing them with products or administrations in a package which are required and at bring down cost. Be that as it may, tie-in arrangements will probably antagonistically influence the economy than being gainful to the economy. a tie in arrangement is something that is a violation of competition law, and in certain circumstances it may not necessarily be so.

Keywords: Tie in arrangement, Anti-Competition and Economy.

INTRODUCTION

A tie in arrangement by its very name seems to refer to an agreement or a system whereby there is some additional condition which is tied to the primary object. In common parlance it could refer to something like a delivery system, where say Flipkart, which is an e-tailer, and E-Kart which provides the delivery of certain products for Flipkart, could also be considered as a tie-in arrangement, whereby they are agreeing to do something together. The meaning of this term under Competition and Anti-Trust Law, is specific, and does not have a very wide ambit. The term has a much wider ambit in common parlance. Under Competition law a tie-in arrangement, refers to a situation where the seller of a good or a provider of a service, sells his good or provides his service with the condition that another good or service shall have to be purchased with the purchase of the first mentioned good or service. For example: the gas pipeline company insisting on the purchase of a gas stove from them, barring which they would not provide the gas pipeline in the first place.

There are two products in this system. The 'tying good' and the 'tied good.' The tying good is the one the customer wants to procure and the tied good is the one he is forced to purchase. In the above example obtaining the service of a gas pipeline is the tying product while, the gas stove the company forces on buy is the tied product.

Essentially the purchase of the gas stove is a way of forced buying, and the same is never good for competition in the market. In this case, since the provider of the service itself is forcing one to buy a gas stove, it is very unlikely that anyone who has got bought the gas stove from the gas pipeline supplier, will actually buy another stove. This by itself affects the competition for gas stoves, and gives the gas pipeline company an advantage.

It can be argued in this case, that the fact that both goods are being provided by the manufacturer is a good thing. That anyone who requires a gas pipeline, will also naturally require a gas stove, and both go hand in hand. While that in itself is true, the problem with the same is the compulsory requirement to purchase. Many customers may already have a gas stove, and were simply looking to acquire a gas pipeline connection. We have to always ensure that the freedom of the customer is never taken away. We must always have a choice with regard what product we wish to purchase or use. This is important to ensure that competition

in the market stays alive. When there are several manufacturer of the same good, they compete with each other for sales in the market. The manufacturer who has the best product at the best rate, is more often than not the manufacturer who makes the most money. Thus competition as a whole, increases efficiency, and generally helps ensure that customers get the product at the cheapest rate.

ANTI-COMPETITIVE AGREEMENTS

Anticompetitive agreements are those agreements that contrarily or unfavourably affect the procedure of competition in the market. As indicated by an OECD/World Bank Glossary, anticompetitive practices allude to an extensive variety of business homes that a firm or gathering of firms may participate keeping in mind the end goal to limit between firm competition to keep up or increment their relative market position and benefits without fundamentally giving products and ventures at a lower cost or higher quality. Essentially, it very well may be said that anticompetitive agreements will be agreements between firms or endeavours that limit or counteract or generally horribly influence competition, and that may help increment the market position or offer of the gatherings and may likewise be to the impediment of the shopper as the items and administrations might be accessible at a higher cost than are accessible in an aggressive market and furthermore might be of a lower quality.

The relevant portion of the competition law which deals with tie in arrangements is under section 3 of the Competition Act, 2002. Prohibition of anti-Competitive Agreements has been provided under Section 3 Chapter II of the Competition Act, 2002. Tie in arrangement is a kind of vertical agreement and has been defined under section 3. It *includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.*¹

Sec. 3(1) of the Act is general and broad in scope. It prohibits any agreement between enterprises or persons in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. There are no hard and fast rules for anti-competitive

¹ cci.gov.in

practices or conduct i.e. each case is to be decided on the basis of facts, under the rule of reason, which means that adverse effect on competition has to be established as a fact in each case.

Sec. 3(2) of the Act declares all such agreements as void, which are entered into by persons or enterprises in contravention of the provisions laid down in sub-section (1) of Sec. 3.

Sec. 3(4) deals with vertical restraints. These are restrictions among enterprises at different stages or levels of production chain in different markets. This covers supply of goods as well as services. Vertical agreements at various levels of the generation or supply chains regularly have solid productivity bases and improve competition. Be that as it may, they may likewise have hostile to aggressive impacts, unreasonably wiping out opponents or making them less viable contenders, or diminishing competition between purchasers or dealers. Since, there is an incredible possibility that vertical enemy of aggressive agreements may not be anticompetitive, controllers require a deliberate financial evaluation of whether a focused or hostile to focused impacts of a vertical understanding will overwhelm when these agreements include undertakings with a noteworthy piece of the overall industry. Vertical restraints are to be examined under the rule of reason and appreciable adverse effect has to be established in each case.

Once an agreement is determined as causing or is likely to cause an appreciable adverse effect on competition, such agreement being void cannot be enforced by parties in a court of law. This could lead to serious difficulties for a party in trying to enforce any claim under such agreements in a court of law. Therefore the consequences of an agreement being held to be anti-competitive could be far reaching for the enterprises. This is why anti-competitive agreements are prohibited by law.

TIE IN ARRANGEMENTS

As defined in Explanation (a) to sub-section (4) of Section 3, tie-in arrangement includes any arrangement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. The product or service that is required by the buyer is called the tying product or service and the product that is forced on the buyer is called the tied product or service.

A good or service is to be treated as being the subject of a tie-in arrangement when its supply is offered on the condition that the buyer who ordered for some good or service required by him is also forced to purchase some other product or service. The basic objection that would arise from the point of view of the buyer is that he is required by compulsion to buy a product or service that he does not need and so is forced to incur unnecessary cost. This compulsion that is created is where the problem arises. Also, from the point of view of the law protecting competition in the market, this would be objectionable on the ground that it reduces competition in the supply of the tied product.²

An example of 'tie-in' or 'tying' arrangement is when manufacturer of product 'A' and 'B' requires an intermediate buyer who wants to purchase product 'A' to also purchase product 'B'. Tying may result on lower production costs and may also reduce transactions and information costs for producers and provide them with increased convenience and variety. Tie-in arrangements need not necessarily be anti-competitive. In India, due to the absence of the per se rule, tying cannot be per se illegal. It can have negative effects on competition if they fence off market efficiency. One thing we have to remember is that tie in arrangements are not necessarily a bad thing. They give the consumer of a good or service related items which they probably need. So if a bike seller gives a helmet lock along with the bike, the same is quite understandable. Even in this case of course one thing to remember is that, the bike seller cannot force the purchaser to buy the helmet lock from him. That is where the illegality lies.

In case of tie-in arrangements, competition with regard to the tied product may be affected as the purchaser may be forced to purchase the tied product at prices other than those at which it is available in a competitive market or he may be forced to purchase a product which he does not require. But in case the tied product is being sold at a lower price or at the same price at which it is available in the market or if the tied product is required by the purchaser, then such tie-in arrangement cannot be said to be anti-competitive. This can be seen in the above example, if the said bike seller were to sell the helmet lock at 50% of the market value.

It is for this reason that tie-in arrangement cases are decided on the basis of rule of reason after taking into consideration the benefits and detriments of the arrangement on the market. It is yet

²Competition Law in India, 3rd ed. T. Ramappa p. 121-122

another requirement that the seller of the tied product has dominance over the market, so that the sale of the tied product has appreciable adverse effect on the competition in the market.

In *Northern Pacific Railway Co. V. United States*³, the Court observed that, “They (tying arrangements) deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time, buyers are forced to forgo their free choice between competing products”. For these reasons, tying arrangements fare harshly under the laws forbidding restraints of trade.

There is nothing wrong with the clubbing of products and/or services, as it often reduces prices, promotes efficiency. For example it makes sense for a car dealer to offer the purchaser car servicing also, but perhaps imposing a condition on the purchaser that he can only get his car serviced from him is problematic. This is because firstly it is unfair to the consumer himself. There are possibly a large number of other car servicers, who may do a better job at a cheaper rate, and therefore it limits the consumer. Secondly if the said car dealer/servicer has a monopoly in some area, or is a dominant servicer in some relevant market, for the sale of cars, if he were to make it obligatory for the person purchasing the car to also get servicing, that would be very bad for the competition of car servicing in that area. The rest of the car servicers would not get business and the apparently dominant one would get a monopoly-esque control over the market, which could possibly lead to hiking prices and/or reducing the quality of service.

BASIC REQUIREMENTS

In order to show something to be a tie in arrangement it is imperative that the same is done after meeting a minimum threshold. The following are the conditions that must be in existence in order to prove that a tie-in arrangement exists, and that the same is anti-competitive.

³ Northern Pacific Railway Co. et al. v. United States 356 US 1 (1958)

- ***Two Separate Products***

So as to have a tying game plan in any case, there must be two items that the vender can integrate. It would appear to be anything but difficult to decide if there are two unmistakable items equipped for being integrated, however the genuine examination of the two separate items (or administrations) issue has demonstrated considerably more intricate by and by. For instance a dealer of shoes offers a couple of shoes together. The vender could offer each shoe independently and require the purchaser of a left shoe to buy a correct shoe with a specific end goal to get the left shoe. Do the left and right shoes constitute two particular, isolate items? And therefore do the actions of the seller who is selling two shoes together amount to a tie-in arrangement? This where the difficulty arises, in finding the difference in products itself, and the importance of having two separate distinct products is clear. This is why, when goods are provided in large quantities, say a packet of 4 bars of soaps, the same cannot come under the ambit of a tie in arrangement.

- ***Coercion or Conditioning***

The second very crucial element to proving that a tie-in arrangement exists, is coercion. Until and unless a person is forced into buying product B, even though he only wanted product A, a tie in arrangement cannot exist. Thus, a bike seller offering a helmet lock or the gas pipeline service provider, offering to sell a gas stove cannot amount to tie-in arrangements. The position of law in the case of discounts offered is not absolute. If say the gas pipeline service provider were to club the gas stove in the deal, and a cumulatively cheaper rate, that does not necessarily make it illegal by itself, but in the same will have to be done through a subjective analysis.

- ***Market Power***

The market power if a seller is also very important in terms of determining whether what has taken place in terms of a deal being offered to the public being a tie-in arrangement. A very important aspect of competition law, something that sets the Competition Act, apart from the MRTP Act, is the way we treat anti-competitive practices. Unless and until there is a possibility of there being an appreciable adverse effect on the competition there is no real concern. In order for examining this there are several ways of figuring it out. The intricacies that have to be figured out, include the relevant product market, the relevant geographic market, market share of tying product, etc.

- *Economic Interest*

This particular condition has not been accepted as essential in all jurisdictions, but the author of this paper personally feels that it is of utmost importance to establish the same. When a company is tying two products together it is imperative that the economic interest of the company is at stake and the same is being promoted. Let me clarify with an example. If the gas pipeline service is only being provided with the purchase of the gas stove, if perhaps the gas stove is a slow moving product and the pipeline is a fast moving one, this sort of tie in could boost the sale of the gas stoves, offered by that particular seller. This would be a tie in arrangement. But if we were to see the case of car and bike companies insisting on genuine spare parts that are manufactured by them to be used, the same has been held to be a protection of goodwill, and not a tie-in arrangement. The distinction in the two is that in the case of the gas stove/pipeline the reason the gas stove company is tying the gas stove is merely to boost sales of the gas stove, and only their direct economic interest is being affected. In the case of the bike or car manufacturer, the main reason for putting the genuine spare parts condition is that they wish to ensure the proper functioning of the car itself, and their own goodwill. The fact that they do generate some income by sale of spare parts is not that relevant for this purpose that the greater economic interest is not to prevent competition in the spare parts market, but to in fact protect their own interest in terms of goodwill of the brand.

TIE IN ARRANGEMENTS TODAY

A tie in arrangement and its general meaning is understood at this point of time. It can be summarised as meaning a situation where one has to purchase an additional good or service in addition to the one we actually want to purchase. The purchase is a sort of compulsion. And in this aspect the law is very clear. But big corporation hire intelligent lawyers to find loopholes in the laws. What has become a visible trend is that a large number of sellers are offering free products along with one product.

Say for example Colgate provides a small tube of toothpaste free with some of its toothbrushes. This is a situation where even though I wanted to purchase only a toothbrush I got a toothpaste free. Since there was no additional cost for me (Prima Facie) I as a customer would normally

just walk out feeling happy, with a good deal. The truth however is that the cost of the toothpaste is probably included in the package itself and it actually free.

Now the case of Colgate would not amount to any sort of violation and in their case, it is mostly a case of product promotion more than anything else. That being said several examples come to mind that are probably tie in arrangements, by their very nature, but they are disguised under the veil of a free product. For example free servicing of a car after purchase, free router and modem with purchase of internet services, free helmet and petrol locks with the purchase of a bike, and even a free gas stove with a gas connection.

The problem with calling them tie in arrangements is manifold. Firstly, in some cases it may truly just be a case of product promotion with no intention to disguise a tie in arrangement, as many companies do particularly when they launch a new product. Secondly, the compulsion is not that real. The coercive or compulsion element is nearly impossible in this case, as the company can always plead that the customers are not obliged to take the free gift. So even though the price remains the same, for a person rejecting a gas stove, and the one accepting it, the truth in such a case is probably that both have in fact paid for the price of “free” gas stove, even if one of the them actually rejected it.

CONCLUSION

On a concluding note I would like to say that a tie in arrangement is something that is a violation of competition law, and in certain circumstances it may not necessarily be so. In the US some conditions when met, make a tie in arrangement per se illegal, while in India, the same never happens. It is always treated as a case of the rule of reason, as provided for in section 3(4) of the Competition Act, 2002.

As time evolves law needs to evolve too. There will always be elements in society who will try to find ways of bypassing laws by exploiting loopholes. I am honestly of the opinion that in the case of some of the free products that are given along with the purchase of another product is often of the nature of a tie-in arrangement, and are the result of the creative imagination of the Management and legal teams of big corporate houses.

What I also feel is that this aspect needs closer attention paid to. Perhaps some analysis of this particular aspect is needed, to truly have fair and free competition. At the same time, such free deals are what makes customers very happy from within, and are sometimes truly a case of mere brand promotion. This is why this aspect needs to be examined in great scrutiny.

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