

ANTI-COMPETITIVE AGREEMENTS

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INTRODUCTION

In a constantly evolving economic scenario, the need for enactment of competition laws became apparent, *The Competition Act of 2002* has been implemented to promote competition and ensure freedom of business. One of the major objectives of the competition act is to ensure that the concentration of economic power does not reside in the hands of a few affluent business houses.

In a bid to fulfill this objective, the Competition Act of 2002 prohibits parties from entering into anti-competitive agreements. This is done to ensure smooth market functioning and protect the interests of the consumer. Therefore, parties to an agreement, although possess the freedom of trade, they cannot enter into an agreement that might be anti-competitive in nature.

ANTI-COMPETITIVE AGREEMENTS

Section 3 of *The Competition Act, 2002* mentions anti-competitive agreements.

Section 3(1) prohibits any undertaking or organization from entering into any arrangement that causes or is likely to cause significant *adverse effects on competition* (AAEC)ⁱ within India. ("Appreciable Adverse Effect" means when some activity restricts the competition in the market)ⁱⁱ

Any agreement among enterprises at different stages of the production chain in different markets in respect of production, supply, distribution, storage, acquisition, or control of goods

or provide services including the following shall be treated as an anti-competitive agreement if it has the following elements:

- Tie-in arrangement;
- Exclusive supply arrangement;
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance;
- Allocate Markets;
- To fix the price.

An agreement includes any arrangement, understanding, or concerted action entered between parties. It may or may not be in writing. Anti-competitive agreements under competition law are broadly classified into two categories: Horizontal Agreement and Vertical Agreement.ⁱⁱⁱ

Although the Competition Act of 2002 does not categorically classify anti-competitive agreements into Horizontal agreements and Vertical agreements, the language of Section 3 (3) and Section 3(4) deals with horizontal and vertical agreements respectively.

WHAT ARE HORIZONTAL AGREEMENTS?

Horizontal agreements are mentioned under section 3(3) of The Competition Act of 2002.

Horizontal agreements are those agreements that are entered into by competitors operating at the same level in the economic process i.e., enterprises engaged in the same level of activity.

These enterprises are at the same stage of the production chain and in the same market.

Horizontal agreements lead to unreasonable restrictions^{iv} on competition and may be presumed to have an appreciable adverse effect on competition. These are the following four categories of agreement amongst competitors which are presumed to be anti-competitive in nature^v:

- Price fixation
- Output control and Production Control

- Market allocation
- Bid rigging or collusive bidding.

Horizontal agreements are put in a specific category under the Competition Act and are assumed to be anti-competitive in nature. This is regarded by law as ‘per se.

WHAT ARE VERTICAL AGREEMENTS?

Vertical agreements are encoded within section 3(4) of *The Competition Act of 2002*. These are agreements that are entered into between two or more enterprises at different levels of production. A few instances of such agreements are agreements between manufacturers of components, manufacturers of products, producer and whole seller, or between producer, whole seller, and retailers. These are agreements between enterprises operating at different levels of production. Examples of Vertical anti-competitive agreements are:

- Special contract of supply and refusal to trade.
- Resale price maintenance
- Exclusive distribution deals
- Tie-in arrangements

For such agreements rule of law ‘per set applies. Vertical agreements are not anti-competitive per se and such agreements are judged by the ‘rule of reason’, and the onus lies on the prosecutor to prove their appreciable adverse effects on competition.

EFFECTS OF ANTI-COMPETITIVE AGREEMENTS

Anti-competitive agreements are agreements that have appreciable adverse effects on the competition in India. The act states that anti-competitive if entered shall be void.

Section 19(3) mentions the factors that help determine if an agreement has an appreciable adverse effect on competition under this section:

- Barriers created to new entrants in the market;
- Driving existing competitive force out of the market;
- Foreclosure of competition out of the market;
- Accrual of benefit to the consumers;
- Improvement in production or distribution of goods or provide services;
- Technical, scientific, and economic development promotion using the production or distribution of goods or provision of services.

EXEMPTIONS TO ANTI-COMPETITIVE AGREEMENTS

There exist some agreements which fall outside the ambit of section 3 of this act. The following agreements are not regarded as anti-competitive agreements:

1. Joint Venture agreement;
2. Any exclusive right granted (Intellectual Property).

Joint Venture agreement

An agreement entered through a joint venture which increases the efficiency of production, supply, distribution, or control of goods or provision of services^{vi} shall not be termed an anti-competitive agreement.

Any exclusive right granted (Intellectual Property)

Any exclusive right granted to a person for production, supply, distribution, or used under any of the following acts:

- 1) The Copyright Act of 1957;
- 2) The Patents Act of 1970;
- 3) The Trade and Merchandise Marks Act, 1958, or the Trade Marks Act, 1999;
- 4) The Geographical Indication of Goods (Registration and Protection) Act, 1999;
- 5) The Designs Act, 2000;
- 6) The Semi-Conductor Integrated Circuits Layout Designs Act, 2000.

INQUIRY AND REMEDIES

Under section 19(4) the competition commission of India is empowered to enquire into anti-competitive agreements. This inquiry can be made by the commission through:

- Suo Moto, i.e., on its own;
- On receiving the information from any person, consumer or trade association; or
- On a reference received by the Central Government, State Government, or statutory authority.

The Director General (DG) does not have the right to move an application for the institution of an inquiry relating to an anti-competitive agreement or abuse of dominance.

Upon receiving the information, the commission reviews and enquires into alleged practices, if the agreement falls within the scope of section 3, it passes the following order^{vii}:

- It may direct the parties involved in the agreement to discontinue or re-enter such agreement;
- A fine shall be imposed and such fine shall not surpass, for the preceding three financial years, 10% of the total turnover;
- In the case of cartels, the fines referred to above shall be applied to each maker, supplier, dealer, broker, or service provider involved in that cartel and the amount of the penalty, can be extended by up to three times its profit for each year of continuation of the arrangement, or by up to ten percent, whichever is greater;
- The commission may direct to amend the agreement to the degree and in the manner that may be stated in the commission's order.
- Payment of costs and delivery of guidance would be provided to the company to comply with the orders;
- Pass any other order or direction it may deem fit.

CONCLUSION

In such a rapidly growing economy as India, it is important to ensure freedom of trade and protect the interest of consumers and enterprises alike. Parties while doing business in India need to keep a check on retaining any anti-competitive element in the agreements between them. *The Competition Act 2022* aims to keep anti-competitive elements in check and promote fair trade practices. Competition brings prosperity to business and it is the job of not only the legislative but also enterprises to identify clauses that promote anti-competitive practices in their agreements.

ENDNOTES

ⁱ <https://www.mondaq.com/india/trade-regulation--practices/250048/anti-competitive-agreements-tests-and-tribulation>

ⁱⁱ Competition Commission of India, <https://www.cci.gov.in/antitrust>

ⁱⁱⁱ Competition Commission of India, <https://www.cci.gov.in/antitrust>

^v <https://www.complybook.com/blog/anti-competitive-agreements-under-the-competition-act-2002>

^{vi} Section 3(3), The Competition Act of 2002 (Act 12 of 2003)

^{vii} Remedies- <https://blog.ipleaders.in/anti-competitive-agreements/>