

ANTI COMPETITIVE AGREEMENTS UNDER  
COMPETITION ACT 2002 BY AMAN  
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**Introduction:**

With the dynamic trends in today's extremely competitive economic market scenario, the emergence of an altogether new age of competition laws in India has been one of the utmost important changes which had been hitherto nonexistent. The factors such as India's changed and overhauled economic policies, removal of trade barriers and all the pro-trade changes, almost instantly led to a paradigm shift in the Indian economic market sphere. This concerned the authorities as it conferred upon them a responsibility to regulate the market forces. Thus, it was necessary for the legislature to make such laws which would ensure fair competition for the benefit of consumers and smooth functioning of market, and though still not impose complete arbitrary external regulation by legislation. Thus with this view, Competition Act, 2002 was brought about after a couple of amendments after its predecessor the MRTP Act, was repealed.

The competition act provides for avoiding certain discrepancies and irregularities which would arise out of unfair trade practices, as a result of free and open market economy. One such discrepancy can be in the form of ANTI COMPETITIVE AGREEMENTS. As it has been observed by National Consumer Disputes Redressal Commission:

*"... Even in any free economy/deregulated economy exploitation of the borrower/debtor is prohibited and is considered to be unfair trade practice. Free economy would not mean licence to exploit the borrowers/debtors by taking advantage of their basic needs for their livelihood. This cannot be permitted in any civilized society - maybe a deregulated free market economy."*<sup>1</sup>

Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed to be anti-competitive.

Section 3 (1) of the Competition Act prohibits any agreement with respect to "production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India".

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<sup>1</sup> Awaz v. Reserve Bank of India and DCM Financial Services Ltd. v. Mukesh Rajput, 2008 Bus L R764 (NCDRC), the National Consumer Disputes Redressal Commission, while deciding the issue of interest on credit taken on the basis of credit cards (joint order)

Thus, it has been observed that the role of the new competition policy is to cater against all sorts of anti competitive practices, formulated as per the report of a High Level committee, appointed by the Government of India, named- Raghavan Committee Report, 2000.

The concept and importance of a fair and healthy competition as summarized by the Hon'ble Supreme Court of India in the case of *CCI vs. SAIL* -

*“Over all intention of competition law is to limit the role of market power that might result from substantial concentration in a particular industry. The major concern with monopoly and similar kinds of concentration is not that being big is necessarily undesirable. However, because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The model of perfect competition is the economic model that usually comes to an economist’s mind when thinking about the competitive markets.”*<sup>2</sup>

Therefore, the primary objective of Competition policy is to achieve:

Unhindered market access economic growth social welfare all round efficiency by- effective allocation of resources, maximum production, and dynamic innovation.

#### **MRTP Act- first trade regulatory legislation in India:**

As per its preamble, the MRTP Act is an “Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.”

#### **Anti Competitive agreements in MRTP Act:**

The broad objectives of MRTP Act, 1970 were threefold:

- a) To prevent concentration of economic power in few dominant hands
- b) Prohibit monopolistic trade practices, and
- c) Prohibit Unfair and restrictive trade practices.

The MRTP Act, provided for violation of most of the anti competitive practices, but still was vague in nature. Its objectives were narrower as compared to the present day competition legislation and were not efficient enough to be at par with the competition policy which was formulated post-liberalisation period of 1990’s.

. Thus, Raghavan Committee was formed, pursuant to whose recommendations The Competition Act, 2002 found its inception.

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<sup>2</sup> (2010) 10 SCC 744

**Evolution of Competition Law in India:**

The objective behind the framing of competition policy in the form of competition legislation, derives its validity through the supreme law of land- The Constitution of India, like all other legislations. Article 38 and Article 39 under the directive principles of state policy, impose a duty upon the state regarding the economic and social aspect of competition and its regulation for common benefit of society.

Article 38 imposes a mandate upon the state to strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39 of the Constitution imposes a mandate regarding five principles of policy to be followed by the State. Out of these exhaustive objectives of article 39, sub clauses (b) and (c) particularly are the directives regarding the basic crux of the competition policy regarding fair trade practices and maintenance of a healthy market competition. It aims towards equitable distribution and access to resources and trade market to everyone interested to be an active part of market economy, and that such individual's or enterprises' interests should not be manipulated by the ones who hold a pre-dominant position.:

The State shall, in particular, direct its policy towards securing

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

Also the clause (c) prohibits any sort of concentration of wealth, power or means of production in the hands of a few dominant market players, thus resulting in the common detriment in general by adversely affecting the interests of other relatively small market players and consumers.

The competition Act mainly focuses upon:

- a) Prohibition of anti competitive agreements
- b) Prevention of Abuse of Dominant position
- c) Regulation of combinations
- d) Establishment of Competition Commission of India- which is the regulatory and adjudicatory body, having quasi judicial, quasi legislative and executive functions with respect to the competition in market.

**Anti Competitive Agreements under Indian Competition Act:**

The provisions of competition Act, 2002 have been influenced and adopted by pre-developed framework of competition laws in the U.S. and U.K. legal systems. Also the related legislations of the European legal system also influenced the Indian Competition regulatory machinery. Anti Competitive agreements constituted an integral part of the Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom laws. The legislative intent derived from the above mentioned legislations for the purposes of anti competitive agreements were the same for enforceability and regulatory purposes.

Sub Clauses (1) and (2) of Section 3, of Competition Act defines anti competitive agreements and provides that any contravention with respect to such agreements shall be void. Under the sub clause (3), the section mentions factors – viz.:

**Section 3**

*(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement 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.*

*(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void*

*(3) of the Competition Act provides that Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—*

*(a) directly or indirectly determines purchase or sale prices;*

*(b) limits or controls production, supply, markets, technical development, investment or provision of services;*

*(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;*

*(d) directly or indirectly results in bid rigging or collusive bidding,*

*shall be presumed to have an appreciable adverse effect on competition*

**APPRECIABLE ADVERSE EFFECT on COMPETITION:**

Section 3 mentions the term “Appreciable Adverse Effect on Competition” (AAEC) under its sub clause (1) and sub clause (3), although the term is not expressly defined under the

Competition Act. AAEC is a phenomenon which is observed when the provisions of the Act are contravened to negatively affect the market players and healthy competition in market. It is important to note that the AAEC should only be adjudged with reference to Indian economic market only, i.e. AAEC caused within India. Sub clause (3) also mentions determining factors while having presumption of the fact that AAEC has been caused. This presumption can be made if the agreement in question or a mutual or multilateral decision taken between more than one market players, leads to any of the four mentioned factors under sub clause (3)

Apart from this, Section 19(3) of the Competition Act expressly mentions the factors which the Competition Commission shall consider while adjudging whether an agreement or an arrangement has caused or is likely to cause AAEC.

Competition authorities around the world have been vigilant regarding the infringement of competition in the relevant market. The European commission, competition watch dog for the European markets, has been one of the earliest competition authorities and a source of inspiration for the CCI. The impact of anti competitive practices observed in the European market has been observed thus: **'Competition authorities all around the world are becoming more conscious of the impact that competition policy and law enforcement has on consumers. They seem to be ever more anxious to declare and demonstrate the significant role they play as enforcers of competition law in consumers' economic life. The European Commission is no exception. The European Commission emphasizes that anti-competitive practices raised the price of goods and services, reduce supply and hamper innovation, which in turn increase the input cost for European businesses and as a result, consumers end up paying more for less quality .**<sup>3</sup>

However, with the inclusion of a proviso to section 3(3), the intent of the legislature is to exclude certain agreements from the purview of being tagged as anti competitive in nature and thus causing AAEC. The effect of this proviso is that any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be presumed to have caused an AAEC.

#### **Bid Rigging and Collusive Bidding:**

Explanation to sub clause (3) of section 3 explains the term "bid rigging" or "collusive bidding" for the purposes of section 3 (3) d, which says that an agreement resulting in bid rigging or collusive bidding shall be presumed to have an AAEC. Bid rigging is an outcome of horizontal anti competitive agreements. According to the explanation- **"bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.**

#### **Cartels:**

The term 'Cartel' finds its mention under section 3(3) of the Competition Act.

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<sup>3</sup> Cseres K.J. 'The Controversies of the Consumer Welfare Standard' (Vol. 3 Issue 2 pp 121-173, March 2007 European Commission, Annual Report, 2005, P 7)

Broadly, Cartels are such agreements, which are explicitly and formally entered by market players. These agreements form a part of a concerted action by the market players to join hands and get together to a consensus to abide by certain anti competitive practices which affect the market competition negatively. *For a cartel to be in existence it need not necessarily meet every day or do something daily to be said to exist. Even a single series of meetings or concerted action with the clear intent to limiting output or fixing prices is sufficient condition for a cartel. As long as the reigning prices and market conditions exist due to the actions of the cartel, the cartel itself would be considered to be continuing.*<sup>4</sup>

#### **Agreements:**

The term agreement finds a detailed mention under the Competition Act under section 2(b), which provides — *“agreement includes any arrangement or understanding or action in concert:—*

- (i) whether or not, such arrangement, understanding or action is formal or in writing; or*
- (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;”*

. In **Neeraj Malhotra vs Deutsche Post Bank Home Finance Ltd. & Ors.**,<sup>5</sup> the competition commission of India, construed the term ‘agreement’ with all its dimensions as:

*“For an agreement to exist there has to be an act in the nature of an arrangement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprises or persons. In this case, the allegation by the informant is that the act of charging prepayment interest/penalty is such an act. Furthermore, for an agreement, it is essential to have more than one party... An agreement is a conscious and congruous act that has to be associated to a point in time”*

The competition Act does not specifically use the terminology, but section 3(3) and 3(4) indirectly classifies agreements into two forms, for the purpose of ascertaining the anti competitive nature, viz:

- i) Horizontal Agreements
- ii) Vertical Agreements

#### **Horizontal agreements:**

Section 3(3) discusses about a specific class of agreements including cartels which are to be presumed to be anti competitive. Horizontal agreements are agreements between enterprises, group of enterprises, persons or group of persons, engaged in trade of identical or similar products. Horizontal agreements are entered between two or more competitors at same level

<sup>4</sup> CASE NO. 01 OF 2009 FICCI - Multiplex Association of India Federation House, Tansen Marg, New Delhi-110001 Versus United Producers/ Distributors Forum 701/702, Building No.29 Samruddhi Cooperative Housing Society Ltd. MHADA Complex, Hoshiwara, Andheri (W) Mumbai-53 & Ors.

<sup>5</sup> Case No. 5/2009 DATE OF DECISION: 2.12.2010

of activity, for example- producers, distributors, manufacturers. Usually the essence and purpose of horizontal agreements is to generate policies regarding production, distribution and price fixation. Also such agreements provide a channel for sharing of information which can usually be price sensitive and may influence the market. Such practices adversely affect competition by prompting antitrust law violations. Horizontal agreements also affect prices and quality of products in the market.

Section 3(3) broadly provides for the restriction of following as being anti competitive in nature- Agreements, practices, and decisions. Cartels are also brought under the purview of being anti competitive under this section. The types of horizontal agreements which are considered to be anti competitive under section 3(3) are:

- a) **Agreements that directly or indirectly determine purchase or sale prices:**
- b) **Limits or controls production, supply, markets, technical development, investment or provision of services -** *According to Livingstone - An example of such an agreement is one where there is a clause that the distributor must ensure the selling of 100 cylinders a month<sup>78</sup>. limitation of sales has a similar effect as well as discouraging competition for new entrants.<sup>6</sup>*
- c) **Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or the number of customers in the market or any other similar way –**  
*Prof. Whish observes that geographic market sharing is particularly restrictive from the customers' points of view since it diminishes choice; at least where the parties fix prices, a choice of product remains and it is possible that restriction of price competition will force parties to compete in other ways. Market allocation agreements eliminate the need to police the pricing practices of the companies which are parties to the agreement and the need for producers with different costs to agree on appropriate prices.<sup>7</sup>*
- d) **Directly or indirectly results in bid-rigging or collusive bidding –**

#### **Vertical Agreements:**

Vertical agreements are the agreements at different stages or different levels of market chain. Franchising is a form of vertical agreement, where the agreement is for leasing the right to use a brand's business model and name by a retailer. Under the Competition Act 2002, section 3(4) provides for agreements which are entered by entities at different stages of production chain:

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<sup>6</sup> (Livingstone, Dorothy (2001): "Competition Act, 1998: A practical Guide", Sweet and Maxwell, London

<sup>7</sup> Whish, Richard, "Competition Law", 6th edition Oxford University Press(2005): 82 OECD Glossary of statistical terms

The section provides for various types of vertical agreements under sub clauses (a) to (e). If AAEC is found to have been or is likely to have been caused by such agreements, then it would be considered to be in contravention to section 3(1); i.e. Such agreements shall be considered as agreements 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.

The most common vertical restraints as per the European competition law are:<sup>12</sup>

- **Single branding**

Single branding results from an obligation or incentive which makes the buyer purchase practically all his requirements on a particular market from only one supplier.

- **Exclusive distribution**

In an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale in a particular territory.

- **Exclusive customer allocation**

In an exclusive customer allocation agreement, the supplier agrees to sell his products only to one distributor for resale to a particular class of customer.

- **Selective distribution**

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors, on the one hand, and the possibilities of resale on the other.

### **Franchising**

Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchiser usually provides the franchisee during the life of the agreement with commercial or technical assistance.

### **Exclusive supply**

Exclusive supply means that there is only one buyer inside the Community to which the supplier may sell a particular final product.

### **Tying**

Tying exists when the supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier or someone designated by the latter.



**Recommended and maximum resale prices**

The practice consists in recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price.<sup>8</sup>

**DETERMINATION OF ANTI COMPETITIVE NATURE OF AGREEMENTS:**

Having discussed the various anti competitive practices, the question arises regarding the determination of true nature of an agreement whether it is actually causing any adverse effect to the market and competition or whether it is harmless and pro-market. Various courts around the world and in India have formulated the following rules to determine the anti competitive nature and effect of the agreements:

- 1) Rule of Reason
- 2) Per Se Rule

**Rule of reason:**

The doctrine of Rule of reason was first stated and applied by the Supreme Court of U.S.A. in its interpretation of the Sherman Act in the case of *Standard Oil Co. of New Jersey v. United States*<sup>9</sup>. Under this judgment, the supreme court of United States observed that any restraint on the market or competition under the then applicable Sherman Act would be anti competitive until it is for promotional and pro competitive purposes. Also the positions before and after the agreement came into force must be ascertained to evaluate the true nature of the agreement, whether it has actually caused any harm to the competition or not. Apart from this, the future probabilities of a negative effect upon the competition, is also to be considered to adjudge the agreement as anti competitive. The supreme court of India officially paved way for the recognition of this rule when the MRTP Act was in force, under *TELCO v Registrar of RT Agreement*<sup>10</sup>. This judgment Also the parameters under section 19(3) which are to be ascertained for the purpose of analyzing the nature and effect of an agreement, justify the applicability of rule of reason in the Indian context.

In formal terms : *The Rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be*<sup>11</sup>

Rule of reason is however only applicable over the class of Vertical agreements, the agreements mentioned under section 3(4) of the competition act 2002. It has been observed that some market restrictions which prima facie seem to be anticompetitive may on further examination be found to have valid efficiency-enhancing benefits.

<sup>8</sup> [http://europa.eu/legislation\\_summaries/other/l26061\\_en.htm](http://europa.eu/legislation_summaries/other/l26061_en.htm)

<sup>9</sup> 221 U.S. 1 (1911)

<sup>10</sup> 1977 AIR 973, 1977 SCR (2) 685

<sup>11</sup> <http://stats.oecd.org/glossary/detail.asp?ID=3305> Khemani R.S., Shapiro D.M. Glossary of Industrial Organisation Economics and Competition Law, 1993.

**Per Se Rule:**

The per se rule, as defined by the Merriam-Webster's legal dictionary is- **a rule that considers a particular restraint of trade to be manifestly contrary to competition and so does not require an inquiry into precise harm or purpose for an instance of it to be declared illegal.**

Agreements under section 3(3) of the competition act 2002, or Horizontal agreements are considered to be illegal and anti competitive ab-initio, i.e. from the very beginning. Unlike vertical agreements, which are subject to the rule of reason and parameters under section 19(3) for ascertaining their true nature and legal validity, horizontal agreements are outright anticompetitive and thus prohibited without considering any criteria.

Agreements leading to collective boycotting, market division, price fixation and tying in arrangements are subjected to be adjudged as anti competitive per se. such restraints falling under the category of horizontal agreements, cause an irredeemable harm to the market competition. The *Per se* rule, as a concept was originated by the US supreme court in 1898, the case *Addyston Pipe & Steel Co. v. U.S.*<sup>12</sup>. This was also a rule formulated at the time of sherman act being in force in the United States. The agreement in question under this case was for the outright purpose of BID RIGGING by formation of a CARTEL. The court opined that the agreement had a direct economic impact and was of such nature that it could not be considered for a partial or limited restraint.

**Exceptions:**

In the Competition Act 2002, some agreements specifically find a mention for being exempted from the purview of being anti competitive in nature even if they are likely to cause an AAEC to the competition. This proviso clearly offers a shield to the agreements which lead to the setting up of joint ventures for the purpose of achieving the larger interests like increased efficiency in various manufacturing processes like production, supply, distribution, storage, acquisition and control. This is with a view to promote the interests of the consumer and for the ultimate benefit of maintaining a healthy market economy at the cost of competition.

Upon similar lines, Section 3(4) (i) protects the intellectual property rights of a person. Indian legal system has certain legislations mentioned under sub clauses (a) to (f) of section 3(4) (i), which provide for intellectual property rights. If an agreement is entered into by a person to protect his intellectual property rights protected by the provisions of above mentioned legislations, then the competition act, 2002 exempts the agreement to be covered under the purview of section 3(1) as being void for the reason of being anti competitive in nature. Such agreements maybe entered into, for the protection of trademark and copyright infringement.

Also, section 3(4)(i) provides for agreements which are entered for export related purposes to be kept out of the purview of section 3(1) and 3(2) for being adjudged as anti competitive. India's economic policy promotes export. Hence, in the best interests of export and to promote active involvement of Indian entities in overseas market, the bar of

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<sup>12</sup> 175 U.S. 211 (1898)

anticompetitive nature is removed from the agreements which are related to production, supply, distribution and control of goods which are to be exported.

### **Judgments and orders of CCI related to Anti Competitive practices in India:**

Since the time when the CCI was brought into functioning by a notification as to that effect, it has been actively functioning as the competition watchdog of India. It has passed various orders with respect to the violation of competition under section 27 of the competition Act, 2002. The anti competitive agreements under section 3 of the competition Act are under the scrutiny of CCI. The validity of such agreements is upheld or denied, upon the judicial scrutiny of the facts of each case by the CCI. Herein below, some important orders of the CCI regarding anticompetitive agreements have been discussed. :

#### ***FICCI Multiplex Association of India v United Producers/Distributors Forum and Ors*<sup>13</sup>**

##### **Brief facts:**

In the present case, the competition commission of India imposed a penalty of 1 lakh rupees upon each of the opposite parties viz: United producers/distributors forum, The association of motion pictures and t.v. producers, and The film and television producers guild of India ltd. for engaging into cartelization upon the information of the complainant- FICCI Multiplex owners Association. The informant alleged that the parties were enjoying a 100% monopolistic market position for production and distribution of hindi films in the multiplexes in India. For the purposes of violation of the provisions of competition act 2002, India was to be considered as the relevant market. It was alleged briefly that the concerted action of the said parties resulted in arbitrary price fixation, against the interests of the multiplex owners. It was further alleged that UPDF and its members have collectively boycotted the multiplex cinema operators in violation of section 3(3)(c) of the Act.

##### **Decision:**

The commission explained the term cartelization and added a new dimension to the concept by stating that “for a cartel to be in existence it need not necessarily meet every day or do something daily to be said to exist. Even a single series of meetings or concerted action with the clear intent

to limiting output or fixing prices is sufficient condition for a cartel. As long as the reigning prices and market conditions exist due to the actions of the cartel, the cartel itself would be considered to be continuing”. In pursuance of a prima facie case established by the informants before the commission, a detailed enquiry by the Director General of Competition into the matter was ordered. The commission agreed with the observations of the enquiry regarding the infringement of section 3(3) and section 3(4) of the competition act 2002, based upon the principles enlisted under section 19(3) of the said act which lays down grounds for presumption of the fact that an agreement or arrangement has caused AAEC. The arrangement clearly led to a horizontal agreement between the film producers and distributors which led to the formation of UPDF, thus positioning them on a monopolistic place in the market and manipulating the market competition and the interest of consumers. As the

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<sup>13</sup> Case no. 01/2009, Date of order- 25<sup>th</sup> May 2011

horizontal agreements are considered to be anti competitive per se, a presumption was placed upon the opposite parties to have caused AAEC. This presumption however is rebuttable in nature. In the view of the commission, none of the opposite parties, in their replies, could justify their conduct and successfully rebut the presumption imposed upon them by the prima facie case of the informant and the detailed inquiry report of the Director General. Hence the penalty was levied, and the association was ordered to be withheld for being engaged in anti competitive practices.

*Neeraj Malhotra v Deutsche Post Bank Home Finance Ltd. & Ors.*<sup>14</sup>

It is one of the leading decisions by the competition commission of India, also known as the prepayment loans case wherein the commission was called upon to examine the issues of anti-competitive agreements and abuse of dominance by banks while charging prepayment penalty on home loans. The informant, Mr. Neeraj Malhotra was an advocate who sought to bring several banks providing home loan facility and charging a compulsory pre payment penalty for prior exit by a customer. It was alleged by the informant that this was the practice adopted by all the private and public sector banks, thus leading to abuse of their dominant position in the market. Also it prevented other market players (new banking and financial institutions) to enter into the market and charge comparatively low rates of interest. The informant further alleged that the acts carried on and the decisions taken by the banks were violative of provisions of the section 3(1), 3(3)(a) and 3(3)(b) read with section 4(1), 4(2)(a)(i) of the Act. The banks are also abusing their dominant position in the relevant market by imposing unfair and discriminatory conditions on the purchase of services thereby preventing their borrowers from switching over to other banks / HFCs offering similar services at cheaper rates which is an anti-competitive practice. Based upon these prima facie allegations, the commission ordered an enquiry by the director general of investigation. The director general brought into the purview twelve more banking institutions for charging prepayment penalty along with the four banks against which the informant alleged initially.

**Majority opinion:**

It was opined by the majority that although IBA was an association but there was no such unanimous decision regarding an arrangement or agreement leading to charging of prepayment penalties by the association. Thus the act of the banks could not be considered as being a result of an anti competitive agreement. Also it was observed that an arrangement between bank and the customer could not be termed as an anti competitive agreement. It was observed: *“It is apparent from a plain reading of the contents reproduced above that the meeting of the IBA was actually to discuss the growing practices of corporate borrowers who would avail of committed lines of credit by banks for working capital but would first look at other market options such as CPs, bonds etc. for funding and use line of credit only as a fallback. This put adverse pressure on asset-liability management by banks. It was only in the context of those discussions that some banks raised the issue of prepayment on*

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<sup>14</sup> Case No. 5/2009, Date Of Decision: 2.12.2010

*housing loans also. The discussion on the subject was consequential and not initial. Even then, it merely resulted in a clear decision that it “should be left to the banks to decide. The lack of imperative voice and intent is evident from the language and content of the said circular of IBA. It would be patently unjust to use it as an evidence of either action in concert or process of combined decision making by banks. This rules out any element of contravention of sub section (1) of section 3.”*

**Dissenting opinion:**

As per the dissenting view, two members were of the view that the arrangement between the banks and the customers was violative of section 19(3) (a) (c) and (d). It was observed that the main objective of the competition law is to ensure the best interests of the consumers and the commission must ensure that these interests are secured and safeguarded. Thus, while broadly construing the matter, the minority opinion was in the favor of customers. The term agreement should be construed broadly by the minority and not strictly as per the statutory definitions. The minority framed its opinion in the following words:

*“...it transpires that members of IBA felt a need for a common approach in fixing pre-payment charges on loans and the issue was discussed and deliberated in the IBA meeting on 28.08.2003 which culminated in the circular dated 10.09.2003 issued by IBA to all chief executives of its member banks. It was noted therein that pre-payment charges in the range of 0.5% to 1% would be reasonable. However, decision in this regard was left to the individual discretion of banks... it may be noticed that the definition is inclusive and not exhaustive. Further, the same has been worded in a wide manner and the agreement does not necessarily have to be in the form of a formal document executed by the parties. Thus there is no need for an explicit agreement and the existence of the agreement can be inferred from the intention and objectives of the parties. In the cases of conspiracy the proof of formal agreement may not be available and may be established by circumstantial evidence only. The concurrence of parties and the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.”*

*Competition Commission of India v Steel Authority of India Ltd & Anr.*<sup>15</sup>

**Background:**

Present appeals arose in pursuance to an issue initiated upon the information furnished by Jindal steel and power ltd. (informants) to the competition commission of India, against the violation of section 3 and section 4 of the competition Act 2002 by Steel Authority of India Ltd. (SAIL). It was alleged that SAIL, which enjoys a dominant position in the market has abused that position by entering into an exclusive supply agreement with Indian Railways for the supply of rails. Thus other market players were completely excluded from having an opportunity to enter into the business. This exclusive supply agreement being a vertical agreement, along with the abuse of dominant position by SAIL, led to AAEC. The prima facie case was established against SAIL, and the commission ordered an enquiry by the

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<sup>15</sup> (2010) 10 SCC 744 Para 1-7

Director General of Investigation. The investigation was proceeded without any representation by SAIL, as when they were asked to file a response they delayed the opportunity. This was challenged in the Competition Appellate Tribunal. The decision of the tribunal was challenged in the Supreme Court.

**Issues:**

The Supreme Court was approached for the purpose of clearing up the ambiguity as to the interpretation of various statutory provisions of the Competition Act 2002, regarding:

- 1) status of orders under section 53A of the competition act whether appealable or not
- 2) Powers and duties of the commission
- 3) Right to notice/hearing to the opposite party (here: sail)
- 4) Standing of competition commission of India as a necessary or a proper party in cases instituted upon the information of informants

**Decision:** The apex court answered each of the issues in detail. Also the crux of the competition Act and the rationale behind the provisions regarding anti competitive practices like abuse of dominant position and regulation of combinations likely to have AAEC were summarized as follows:

**“The principle objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effects on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country. In other words, the Act requires not only protection of trade but also protection of consumer interest. Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti- competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. Thus, while dealing with respective contentions raised in the present appeal and determining the impact of the findings recorded by the Tribunal, it is necessary for us to keep these objects and background in mind.”**

Regarding other points of contention the court held:

- 1) The legislative intent behind the provision of section 53A is to be observed while deciding the status of orders of competition commission of India whether appealable to the competition appellate tribunal or not. Only the orders specifically provided for under the section should be considered as appealable.
- 2) The powers and duties of the competition commission of India were clearly demarcated. The court held that the commission owed a duty of care while passing interim orders under section 33 so that a substantial prima facie case is established regarding the contravention of the provisions of the act and so that the orders are not passed arbitrarily. Also it was noted that the powers of the commission were wide

regarding issuing of the notice of hearing to the parties and was not in any form bound to hear a reply if the party fails to furnish the same.

- 3) Regarding the point of commission being a party to the case, the apex court while reversing the view of tribunal held that commission must be a necessary or proper party in every case, even if the investigation was initiated upon an information received by a third party.

### **Conclusion:**

From a vague MRTP Act to the well defined and specialized Competition Act 2002, competition legislation in India has been through a number of changes. Today, the competition Act 2002, although still young and nascent, stands firmly established on a strong foundation. Many technical aspects have been included and provided for distinctively by the legislature, thus removing any possible ambiguity or a vacuum. The concept of anticompetitive agreement has been explored deeply in the Act. With such provisions the Act aims towards protecting the interests of customer, a self regulated healthy market economy and to provide better competitive environment to the market players. Thus, the external aspect of law has been provided with sufficiency and soundness. Section 3(1), (3) and (4) read with section 19(3), together provide for anti competitive agreements and the factors causing AAEC. Based on these factors, the act seeks to provide whether such agreements are to be presumed illegal per se or the rule of reason is to be applied before adjudging the agreement illegal.

On the other hand, the internal aspect of law, i.e. the judicial interpretation has been also provided for by conferring adjudicatory powers to the CCI and forming a competition appellate tribunal for the purposes of appeals. It can be clearly observed by the orders and judgments passed by the adjudicatory authorities, viz.: CCI, COMPAT, and the Supreme Court of India in various issues related to anti competitive agreements under the Competition Act 2002, that for adjudging an agreement or arrangement as being anti competitive under section 3(1) of the act, it must fall either under the category of section 3(3) or 3(4). Section 3(1) is the main provision having a force and vigor of its own but section 3(3) and (4) are the enabling provisions, included with the legislative intent of providing grounds for the application of section 3(1).