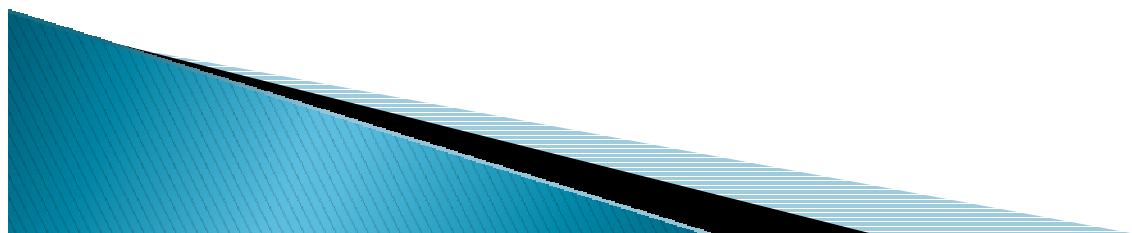


CCI, ICWAI, ASSOCHAM Seminar on
“Industry on High Growth Trajectory under the New
Competition Regime “

Presentation on
*Understanding and Evaluating Anti-Competitive
Agreements*

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1 May, 2008



Why Regulate Competition?

- ▶ A Basic Question: Why is Government regulation needed to protect the market from private anti-competitive restraints?
- ▶ Aristotle believed it is best to have property private, since then each person will labour to improve his own prosperity.
- ▶ But practical experience: in absence of regulatory oversight, interests of smaller players and consumers compromised as firms fight for capital, raw material and consumers.
- ▶ Early legislation:
 - 50 B.C.: Roman legislation targeting profiteering
 - 483 AD: Roman Constitution protecting consumers from artificial increases in prices of essential goods
 - By end of 13th century: England and France had statutes prohibiting specified restrictive practices.
 - Late 19th century: Laws in US and Canada

Regulating Anticompetitive Agts under the Competition Act, 2002

- The term ‘Agreement’ is defined widely
 - Includes arrangement/ understanding/ action in concert
 - Formal/ Informal/ Writing/ Oral
 - Whether or not intended to be legally enforceable

- The Act prohibits “Anti-Competitive Agreements” (ACA) in respect of
 - Production, Supply, Distribution, Storage, Acquisition or Control of goods or Provision of Services

- Basic Test: Does the Agreement cause/ or is likely to cause ‘Appreciable Adverse Effect on Competition in India’

Appreciable Adverse Effects

- The Act lists indicators for assessment by the CCI regarding ‘appreciable adverse effect on competition’.
- The list provides for a flexible inquiry, which may vary depending on nature of agreement and market circumstances.
 - 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
 - Accrual of Benefits to Consumers
 - Improvements in Production or Distribution or Provision of Services
 - Promotion of Technical, Scientific and Economic Developments by means of Production or Distribution of Goods or Provision of Services

Two Types of Agreements

- Two Broad Types of Agreements:
 - Horizontal Agreements (Cartels and Non-Cartels)
 - Vertical Agreements
- Impact of these Agreements: Primarily on Burden of Proof
- Act lists certain types of Horizontal Agreements which are *presumed* to cause Appreciable Adverse Effects. This means, Burden of Proof will be on Respondent to establish through Evidence how their Agreement does not result in AAE.
- For Vertical Agreements, burden on CCI to determine through evidence that there is AAE.

Horizontal Agreements

- Horizontal agreements: Agreements between enterprises in the same level of production, services etc, includes Cartels. The following agreements are presumed to have Appreciable Adverse Effect on Competition. Agreements that:
 - Directly or indirectly determine purchase or sales price
 - Limits or controls supply, production, markets, technical development, investment or provision of services
 - Shares the market or source of production or provision of services in the market by allocation of geographical area, or types of goods or services, or number of customers, or other similar way
 - Directly or Indirectly results in Bid Rigging or Collusive Bidding
- Exception for Joint Ventures *if* such agreement increases efficiency in Production, Supply, Distribution, Storage, Acquisition or Control of goods or Provision of Services

Cartels

- The most insidious form of Horizontal Agreement: Cartels
- Inclusive definition for Cartels under Act:
 - Agreement between Association of Producers, Sellers, Distributors or Traders
 - To limit, control or attempt to control production, distribution, sale or price
- Challenge– gathering factual evidence in a Cartel investigation is difficult because of prevalence of secrecy in dealings, very little written evidence, etc.
- Worldwide, therefore, ‘Leniency Programmes’ have emerged as a useful plank of investigation
- Under our Act, provision of ‘Lesser Penalties’
- Draft Regulations on ‘Lesser Penalties’ specify circumstances for Full and Partial leniency. Basic Principle: Commission can offer lenient treatment to any whistle–blower from the Cartel that provides information and fully cooperates.

Non-Cartel Horizontal Agreements

- ▶ Activities of Trade Associations: Mostly beneficial, but in some instances, can lead to fixing of prices, or allocation of territories, or even rigging of bids, etc.
- ▶ To play it safe, advisable for such associations to have very carefully crafted agenda and detailed minutes of deliberations
- ▶ Advisable not to share sensitive commercial information on:
 - Prices and discounts, standard terms for customers
 - Price terms of bids
 - Conditions of Supply
 - Profit margins
 - Cost structure and calculation methods
 - Which distributors and suppliers to use or not to use
- ▶ Data sharing: Only historic and not forward looking
- ▶ Credit References: Should be in general terms, not on terms under which a company will or will not deal with specific customer

Vertical Agreements

- ▶ Agreements between enterprises at different stages or levels of production distribution chain etc. There is no presumption of appreciable adverse effects. Such effects will have to be established in respect of vertical agreements.
- ▶ Vertical Agreements include:
 - Tie in arrangements
 - Exclusive supply Agreements.
 - Exclusive distribution Agreements.
 - Refusal to deal.
 - Resale price maintenance.
- ▶ Main concern: Competitive effects on retail distribution– such agreements could have economic efficiencies or they could harm competition. Except for RPM, which in most cases, will harm competition.
- ▶ Each case needs to be evaluated carefully.
- ▶ EC has provided block exemptions for certain types of agreements:
 - Research and Development
 - Technology transfer
 - Motor vehicle distribution

Vertical Agreements (Cont'd)

Tie-in Agreements:

- ▶ Agreement to sell a product or service (the 'tying item') only on condition that buyer agrees to:
 - ▶ Buy a second ('tied') product from seller (or an affiliate co.), and/or
 - ▶ *Not* to buy the tied product from another supplier
- ▶ Possible Justifications: Assuring proper functioning of a complex diagnostic equipment; or where tied product not available otherwise

Concerns with Exclusive Supply and Exclusive Distribution Agreements:

- Prohibition of working in specific areas, with other suppliers
- Time period of exclusivity
- Volume discounts, Rebates, Credits, Bonuses, etc.
- ▶ Mostly, business justification since these allow ability to invest in complex training, effective marketing, save on sales expenses, etc.
- ▶ MTRPC has considered such circumstances on tests such as:
 - Requirement for efficient after-sales service/specialized repair etc.
 - Sufficient number of suppliers in market
 - Exclusivity only at wholesaler level; not retailer

Vertical Agreements– (Cont'd)

Refusal to Deal:

- ▶ Adopted mainly to support an Exclusive dealing arrangement , or to sell product only to a specific class of customers/geographic region
- ▶ Anti-competitive concerns:–
 - Refusal to supply spare parts to remove competitor
 - Termination of dealership agreements as *punishment* for dealing with another person, or for protesting against company practices
- Justifications: Benefits to end-users

Resale Price Maintenance

- ▶ Agreements that stipulate:
 - price for resale of goods, including formulas for price calculation;
 - profit margins; maximum discounts;
 - threat of refusal to supply; loyalty rebates for RPM; etc.
- ▶ Concerns: Don't allow independent determination of price; Influence upward movement in prices; Discourage reduction of prices
- ▶ Way outs:
 - “Price not to exceed...”;
 - Recommend Prices with caveat its only for guidance;
No action for non-compliance

Agreements to enforce IPRs

- ▶ No restrictions on Right of person to impose Reasonable conditions to protect Copyright, Patent, Trademark, Geographical Indications, Design marks: Lawfully Gained Monopolies
- ▶ Test of what is Unreasonable– to evolve on case by case basis
- ▶ Examples from other countries of what is unreasonable:
 - Unilateral Refusal to License Patents: While right to exclude is a core principle of a patent right, conditional refusals to license that cause competitive harm are suspect.
 - Pooling arrangements in which members pool licenses, agree not to grant to third parties, sometimes agree to grant only to each other: could result in reducing incentives for R&D, foreclose innovation, result in price-fixing.
 - Tying and Bundling of IPRs: Typically when tying product is patented and 'tied product' usually a related unpatented commodity
 - Restrictions on licensee to deal in rival's products

Consequence of a ACA

- If the Commission finds an Agreement to have Appreciable Adverse Effects, then the following consequences can follow:
 - Order for Discontinuation of the Agreement
 - Order of Penalty of not more than 10 percent of the average turnover for the last 3 financial years upon each person/enterprise which is a party to the Agreement
 - If Agreement is by a Cartel, then Penalty on each Producer, Seller, Distributor, Trader or Service Provider, shall be higher of:
 - Up to 3 times of its profit for each year of continuance of the agreement
 - 10 percent of its turnover for each year of continuation of the Agreement
 - Direct Modifications in the Agreement to make it compatible with the Competition Act
 - Interim Injunction may also be granted restraining an enterprise from carrying on the Agreement pending investigation

Consequences of Contravening CCI order

- Proceedings for recovering penalty– to be specified in Regulations
- Failure to comply without ‘reasonable cause’. Shall result in:
 - Fine which may extend to Rupees One Lakh per day of non-compliance, subject to a maximum of Rupees One Crores
 - Imprisonment for a term of up to 3 years, or with Fine which may extend to Rupees Twenty Five Crores, or both
- Any person may approach Appellate Tribunal for recovery of Compensation from an enterprise for any loss or damage caused as a result of non-compliance by the enterprise of the CCI’s directions

THANK YOU