Investigating Anticompetitive Agreements

Competition Commission of India
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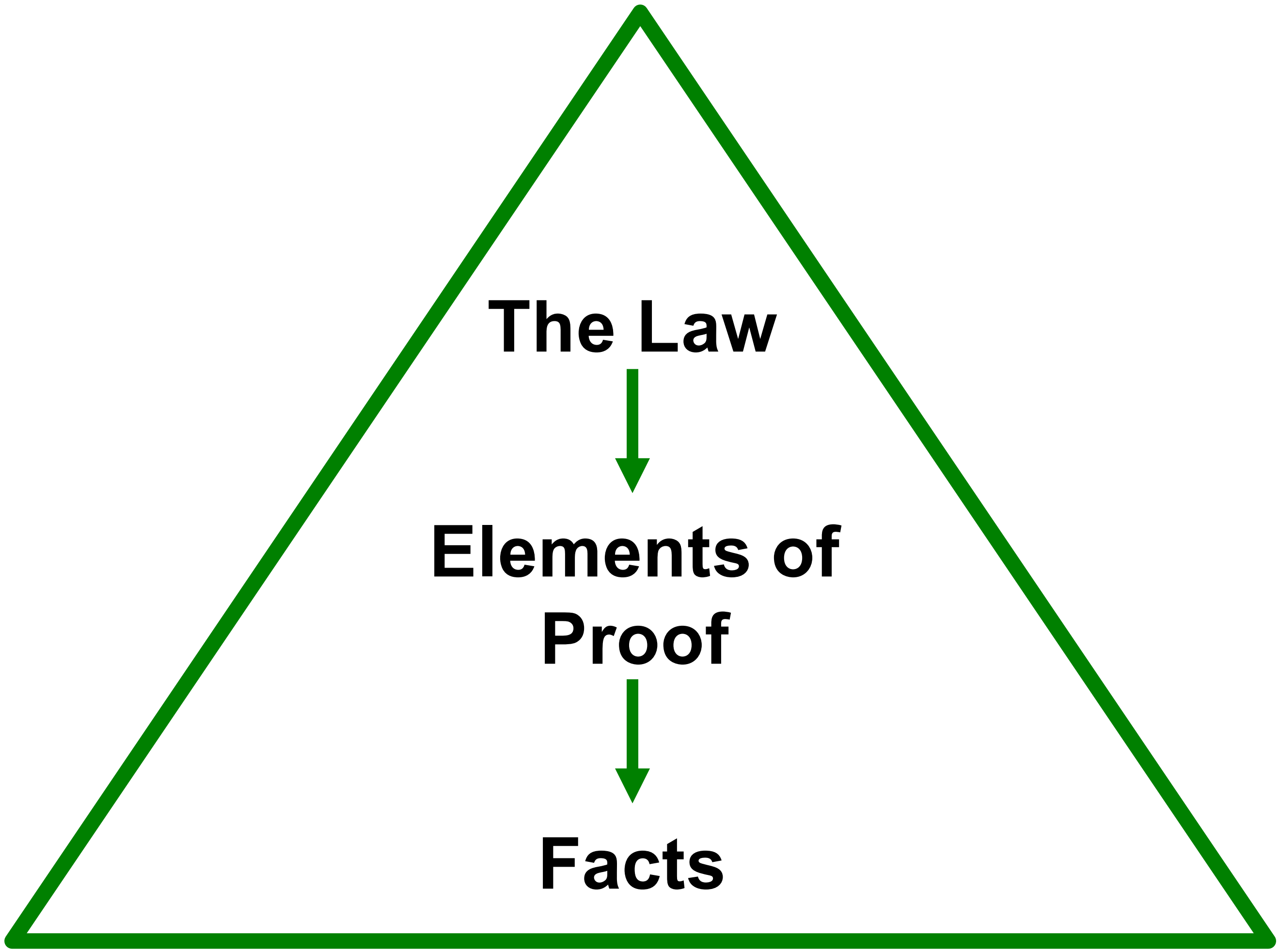
Is There a Violation of the Law?



Investigative Techniques for Finding the Facts

Why Investigate Agreements: The Monopoly Problem

1. A monopolist creates artificial scarcity of its product by producing less and selling it at a higher price than if it faced competition.

2. In competitive markets rivals would see this as an opportunity to make more sales by increasing their production and charging a lower price.

3. Firms, by entering into horizontal or vertical agreements, may be able to collectively exercise monopoly power, thereby doing the same harm to competition and consumers as a monopolist.

The Chain of Production

VERTICAL

Supplier	Supplier	Supplier
Manufacturer	Manufacturer	Manufacturer
Wholesaler/ Distributor	Wholesaler/ Distributor	Wholesaler/ Distributor
Retailer	Retailer	Retailer

Customers (End Users)

HORIZONTAL

Cartel Agreements

- **Price-fixing agreements** – agreements among competitors concerning the prices they charge for their products.
- **Market division agreements** – agreements among competitors to divide the customers, territories, or the products each will make.
- **Concerted refusals to deal** – agreements among competitors not deal with others or to do so only upon collectively determined terms. [Not expressly mentioned in the Indian Competition Act. Instead, the Act condemns output-fixing agreements.]
- **Bid-rigging** – agreements among competitors on who should win the bid.

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

Adam Smith, *The Wealth of Nations* (1776)

Difficulties in Forming & Maintaining Cartels

- Getting most of the competitors to join.
- Reaching agreement among the members.
- Policing adherence to the agreement.

Characteristics of Markets Prone to Cartelization

- There are few companies.
- The companies are similar along key dimensions.
- The product is homogenous or similar in nature.
- The product does not have close substitutes.
- Information about transactions is widely available.
- A bidding process is involved.

Other Horizontal Agreements

- Involves some integration of economic activities among competitors, but also may raise costs to consumers through the creation and exercise of market power.

- Usually subject to rule-of-reason analysis.

- Some examples:
  1. Trade association rules & standard setting
  2. Cooperatives
  3. Joint ventures
  4. Mergers

Potential Efficiencies from Horizontal Agreements

- **Economies of Scale**
  - When costs falls with increasing output.
  - Can be found in production, purchasing, distribution, warehousing, marketing, advertising, and research and development.
- **Economies of Scope**
  - When it is cheaper to produce two products together than it is to produce them separately.
- **Sharing or Spreading of Risk**
- **Practical Test: Is the whole greater than the sum of its parts?**

General Guidance for Analyzing Horizontal Agreements

- What is the agreement, and who are its participants?
- Does the agreement give its participants the potential to create or facilitate the exercise of market power?
- What are the possible efficiencies, and is there any evidence to support those efficiencies?
- Is the agreement reasonably necessary to achieve the efficiencies?

Vertical Agreements

1. **Tying** – when a seller conditions the sale of one product upon the buyer's agreement to purchase a second product.

2. **Exclusive Dealing** – when one party forbids the other from dealing with third parties or imposes contractual terms that make it costly for the other to deal with third parties. [The Indian Competition Act divides this into supply and distribution agreements and also includes "refusal to deal."]

3. **Resale Price Maintenance** – when one company sets the minimum price that others may charge for the product.

How Vertical Agreements May Restrain Competition

1. Eliminating competition through “foreclosure.”

2. Raising barriers to entry or “raising rivals’ costs.”

3. Creating distributors’ or manufacturers’ cartels.

How Vertical Agreements May Benefit Competition

1. Lowering transaction costs.
2. Assuring a steady supply of key input.
3. Eliminating negative externalities.
4. Getting around another company's exercise of market power.
5. Preventing "free riding."

General Guidance for Analyzing Vertical Agreements

- Who is complaining?
- Does one of the parties to the agreement have – or is it likely to have – significant market power?
- What are the possible efficiencies, and is there any evidence to support those efficiencies?
- Is the agreement reasonably necessary to achieve the efficiencies?

What Are the Elements of Proof for Per Se Violations?

1. An agreement
2. Among competitors
3. On price or output
4. Without integrating their business activities in any economically meaningful way

What Are the Elements of Proof for Rule of Reason Cases?

1. An agreement
2. Among two or more parties
3. Affecting price or output
4. That may involve some economic integration of the parties' business activities
5. But causes, or is likely to cause, competitive harm, as demonstrated by:
   - Actual anticompetitive price/output effect
   - Market power
   - Inference of market power from high market share

Who Has the Burden of Proof?

1. Government must establish:
   a. An agreement
   b. A theory of competitive harm
   c. Some evidence that the harm has, or is likely to have, an effect

2. Burden of production shifts to defendant to establish:
   a. A theory of competitive benefit (an efficiency justification)
   b. Some evidence to suggest the efficiency is real
   c. A showing that the restraint is reasonably necessary to achieve the efficiency

3. Burden shifts back to government to show likely harm outweighs possible benefit.

What Kinds of Evidence Are We Looking For?

- This discussion of cartels and horizontal and vertical agreements provides an introduction to the kinds of facts and evidence you should be looking for.
- Much of your career as a competition law practitioner will be spent dealing with issues related to the facts and evidence necessary to prove or disprove a law violation.

How Much Proof is Necessary?

- **Legal standard** – the conduct at issue must be proved by a “preponderance of evidence.”
- **Practical standard** – whatever it takes to persuade the “trier of fact.”