



Anti-competitive agreements

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Elements of CA02



- There are three elements:
 - ❑ Prohibiting anti-competitive agreements
 - ❑ Prohibiting abuse of dominant position
 - ❑ Regulating combinations
- There is a fourth element : competition advocacy

Agreement - 1



- Existence of agreement is must
- Agreement between
 - Person and person
 - Person and enterprise
 - Enterprise and enterprise
 - Person and AOP
 - AOP and AOP
 - Person and association of enterprises
 - Associations of enterprises
 - AOP and association of enterprises

Agreement-2



- Agreement is defined very widely.
- Inclusive definition – includes any arrangement or understanding or action in concert
- Includes formal or informal, written or oral agreements
- Includes agreements not meant to be legally enforced.

Agreements-3



- Agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services

Anti-competitive agreements-1



- that cause or are likely to cause appreciable adverse effects on competition within India are anti-competitive agreements

Anti-competitive agreements-2



- Such agreements are prohibited by law.
- Such agreements are VOID.

Horizontal agreements



- Agreements between enterprises or persons etc. (including cartels) engaged in trade of identical or similar products are presumed to have AAEC if they
 - Directly or indirectly fix purchase or sale prices
 - Limit or control output, technical development, etc.
 - Share markets
 - Indulge in bid-rigging or collusive bidding

Cartel: definition



- Inclusive definition
- Between association of producers, sellers, distributors, traders, etc
- Agree to limit, control or attempt to control production, distribution, sale or price

Cartels



- Regarded as most pernicious form of anti-competitive behavior.
- Hard core cartels is on top of the agenda of most competition authorities
- Leniency programs have resulted in higher rate of detection
- Vitamins cartel, electro-graphite cartel, etc-heavy fines
- Loss to developing countries enormous



Lysine Cartel

- Lysine cartel is one of the landmark cases decided in the US-
 - ★ Two Japanese, two South Korean and one US company agreed not to compete on price
 - ★ Price of lysine rose on account of collusion from 68 cents per pound to 98 cents in 1990 and continued at that level until detection in 1995.
 - ★ Evidence collected by DOJ with the assistance of FBI included documents/ transcripts of secretly recorded conversations.
 - ★ Controversy on overcharges-the basis of fines

Vitamins Cartel-1



- All major manufacturers involved
- Leniency sought by Rhone Poulenc after merger with Aventis in 1999
- 13 members – 6 European & 7 Japanese
- “alphabet soup” Vit A to H
- Meetings took place mostly in Switzerland and were logged as “budget meetings”
- Purpose – to freeze market share at 1988 level
- Rhone provided lot of documents and got 100% lesser fine (of Euro 1 m)
- India is estimated to have lost \$ 25 m

Vitamins cartel-2



- In the US the vitamins concerned and the period of cartelization were as follows:
 - Vit A & E--Jan 1990-Feb 1999
 - Vit B2--Jan 1991 – at least Fall of 1995
 - Vit B5 -- Jan 1991 – Dec 1998
 - Vit C – Jan 1991 – at least Fall of 1995
 - Beta carotene -- Jan 1991 – at least Dec 1998
 - Vitamin pre-mixes -- Jan 1991 – at least Dec 1997

Vitamins cartel-3



- BASF, Roche pleaded guilty and were fined \$ 225m and 500m resp..
- Two most senior executives of Roche pleaded guilty and served 4/5 months prison sentences
- Takeda, Eisai and Daiichi pleaded guilty and paid fines totalling \$137m
- Rhone Poulenc was granted conditional immunity for cooperating with DOJ

Vitamins cartel-4



- The following pleaded guilty in the Federal Court of Canada and paid criminal law fines as follows:
- Roche – CAD 48m
- BASF – CAD 18m
- Rhone Poulenc – CAD 14m
- Daiichi – CAD 2.5m
- Eisai – CAD 2m

Vitamins cartel-5



- Documentary evidence provided by Rhone and later by other conspirators
- Meetings held to allocate 'budgets'- an euphemism for volume allocation
- Agreement on policy of “price before volume”
- Meetings attended by most senior corporate officers

Vitamins cartel-diehards



- After their detection in the US, the members became 'discreet'
- Meetings were abandoned for one-to-one contacts
- Such contacts were called "top-level and operational meeting"
- Sales data continued to be exchanged from residences of executives

When do cartels succeed?



- Number of firms are few
- Firm sizes are similar
- Entry is difficult
- Firms' costs are similar
- Homogeneity of products is great
- Information on rivals' prices is available
- Demand is stable
- Small and numerous buyers

Fines on cartels : CA02



- The penalty on cartel is up to 3 times the profit of each member OR up to 10% of the turnover of each member for the period such behavior continued.

Leniency



- Leniency, as tool for detecting cartels, got a fillip with the announcement of the Amnesty Scheme in the US in 1993
- CA02 permits lesser penalty under certain conditions
- In order to incentivise members to seek leniency, regulations seeks to make the process transparent and certain

Bid-rigging/collusive bidding



- Affects public procurement
- Overcharge of 15-20% according to a study in the US covering 1988-93
- Not an uncommon practice in India
- Several government sector buyers have reported – e.g. Railways, Coal India

Vertical agreements-1



- Agreements between enterprises at different stages or levels of the production chain
- No presumption of AAEC
- Rule of Reason test
 - Preponderance of probability
 - Burden shifts to the Commission

Vertical agreements-2



- Examples given in the CA02
 - ❑ Tie-in sales
 - ❑ Exclusive supply agreements
 - ❑ Exclusive distribution agreements
 - ❑ Refusal to deal
 - ❑ Resale price maintenance
- Inclusive list
- Prohibited only if AAEC is established

Vertical restraints



- Toys 'R' Us is a chain of stores in the US selling toys and other products manufactured by others.
- Toy manufacturers agreed with TRU not to sell items sold to its rivals, warehouse clubs.
- Vertical restraint successfully imposed by a player having low market share
- Orchestrated 'horizontal agreement' among its key suppliers to boycott its competitor stores.

Microsoft case in the EU



- Dominance of MS in the Windows client PC operating system established - >90% market share
- WMP tied product – Windows XP available only with WMP
- Customers choice restricted
- Competitors could not effectively compete – foreclosure of market

IPRs



- Agreements involving 6 IPR laws that impose reasonable restrictions are out of purview of the general prohibition
- What is reasonable or what is unreasonable is not stated.

Bayer AG - 1



- Bayer AG was a major global supplier of insecticides except in USA.
- It developed a new unique and potent active ingredient for insecticides for household use and secured a patent for the technology.
- It licensed the new technology to S C Johnson & Sons, a dominant market leader in pesticides market, the market

Bayer AG - 2



- Johnson's market share was 50-60%.
- The DOJ challenged this licensing arrangement which reduced incentives of Bayer to compete with Johnson in manufacture and sale of household insecticides and which further helped Johnson to increase its dominance in the US market.

Bayer AG - 3



- The Court decided that Bayer should offer the patented ingredients to other manufacturers and also those that Bayer may introduce later.
- Through this decision, the court sought the maintenance of competitive markets while protecting the IPR.

(US vs S C JOHNSON & SONS (C iv No.4089 – 59 FED. REG 43, 859, 25 AUGUST 1994)

Export cartels



- Agreements exclusively for exports are excluded from the rigours of the law.
- How do we deal with cartels located in other countries exporting to India?
- Do we need to take care of this in our trade treaties?



**Thank you
for being patient**