COMPETITION REGIME IN INDIA: IN DEPTH ANALYSIS OFANTI-COMPETITIVE AGREEMENTS

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ABSTRACT

Competition is an essential factor for increasing the potential of an economy to be competitive globally and for creating a consumer oriented and consumer friendly environment in the domestic market. Liberalisation alone is not sufficient and there is a need for a competition policy to promote competition. Such a policy has a critical place in the restructuring of developing and transition market economies. It encourages competition by keeping a check on potential monopolies and making sure that businesses act fairly in relationship to each other. The purpose of competition policy is to promote efficiency by preventing anti-competitive practices of firms. It is a set of legislative measures and rules that directly impact on the behaviour of individual enterprises and the structure of industries. It is concerned with the easing of Restrictive Business Practices that hinder free and fair competition and affect the measures taken to either promote a more competitive environment or to prevent a reduction in competition.

Anti-competitive practices are sometimes known as restrictive practices. The main motive for these practices is to increase prices so the firms can benefit from higher sales revenue.Competition policy prevents the ill effects of cartels and the transformation of public monopolies into private monopolies. The firms try to reduce the competition in the market indifferent ways:Market sharingPrice fixing,Bid rigging,Dumping,Predatory pricing, etc.

Keywords: Anti-competitve agreements, bid rigging, cartels, per se rule, resale price maintenance, rule of reason

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INTRODUCTION

Competition policy can be defined as the measures taken by the government which affects the behaviour of an enterprise and the shape or structure of an industry. From a past few years the task of the policy makers has become even difficult due to increasing challenges being faced by the economy and the businesses all over the world. During the era of globalization India opened up its economy by removing the restrictions and it resorted to liberalization. As a result of this there was a need that Indian market should be geared up in order to face competition not only from within the country but also from outside.[2] The financial crisis which gripped the world highlighted the importance of an effective competition policy. A competition policy which encourages the markets to work well for the benefit of business and consumers thereby increases the country's economic fitness. The markets characterized by effective competition makes firms innovate more, keep prices down for consumers and improved total factor productivity drives economic growth.[3]

Competition policy is defined as those government measures that affect the behaviour of enterprises and structure of the industry with a view to promoting efficiency and maximizing consumer/ social welfare.[4]There are two components of a comprehensive competition policy-[5]

1. The first involves putting in place a set of policies that enhance competition or competitive outcomes in the markets, such as relaxed industrial policy, liberalized trade policy, convenient entry and exit conditions, reduced controls and greater reliance on market forces.
2. The other component of competition policy is a law and its effective implementation to prohibit anti competitive behaviour by businesses, to prohibit abusive conduct by dominant enterprise, to regulate potentially anti competitive mergers and to minimize unwarranted government/regulatory controls.

In the stir of economic liberalization and extensive economic reforms introduced by India since 1991 and in consistency with the commitments made at the WTO, in Oct.1999, the Government of India appointed the Raghavan Committee on Competition Policy and Competition Law to

[2]*Competition Act, 2002 And Its Relevance in India, Legalserviceindia.com (2017), http://www.legalserviceindia.com/articles/compet.htm (last visited Feb 13, 2017).*
[3]*Ranjana Iyer, Competition Law and Policy: A Brief Overview of the Indian Perspective | LawQuest Lawquestinternational.com (2017), http://lawquestinternational.com/competition-law-and-policy-brief-overview-indian-perspective (last visited Feb 5, 2017).*
[4]*Ibid.*
[5]*Ibid.*

recommend a modern competition law for the country in sequence with international developments and to suggest a legislative framework, which may bring about a original law or suitable amendments to the MRTP Act.The Committee submitted its report to the Central government. The Central Government after taking into consideration the suggestions of the trade and industry and the general public decided to enact a law on Competition to replace the then existing competition law namely, the Monopolies and Restrictive Practices Act (1969) (the MRTP Act) which was primarily designed to restrict growth of monopolies in the market with a modern competition law in sync with the established competition law principles.[6] As the first step towards this transformation, a new Competition Act, 2002 was enacted which received Presidential assent on January 13, 2003.

METHODOLOGY

In this research paper doctrinal research methodology has been used. Different legislations, books and articles have been referred to conduct this research.

WHY COMPETITION IS NECESSARY?

Competition has been defined by the court as a process that requires numerous participants and decentralization.[7] Competition was described as a tool for deconcentralization and therefore, Court applied merger law to prevent concentration.[8] Competition laws have been described as magna carta of free enterprise and they are important for the preservation of economic freedom and our free enterprise system.[9] The need for competition law arises because market can suffer from failures and distortions, and various players can resort to anti-competitive activities such as cartels, abuse of dominance etc. which adversely impact economic efficiency and consumer welfare.[10] Thus there is a need for competition law to provide a regulative force which establishes effective control over economic activities. Competition law protects competitive markets for promoting efficiency by prescribing certain types of conduct.[11] Any conduct, which prohibits or restricts firms from entering into market, introducing new products are considered illegal by competition law.

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[6] *Ibid*
[7] *United States v Philadelphia Natil Bank 374 U.S. 321, 369 (1972).*
[8] *Ibid.*
[9] *United States v Topco Associates Inc. 405 U.S. 596,610 (1972).*
[10] *Versha Vahini, Indian Competition Law (1 ed. 2016).*
[11] *Ibid*

THE OBJECTIVES OF COMPETITION LAW

The objectives of competition law are provided as follows-[12]

A. ECONOMIC EFFICIENCY AND WELFARE-

I. EFFICIENCY- One possible objective of competition law is economic efficiency. This section seeks to show why competition is thought to achieve efficiency and produce the greatest benefits to society.

II. PERFECT COMPETITION AND EFFICIENCY- The theory of perfect competition presents a model of a market on which efficiency is maximized and cannot, therefore be improved by the application of competition rules.

A perfectly competition market is one in which there is a large of buyers and sellers, the product is homogenous, all the buyers and sellers have perfect information and there are no barriers to entry or exit so that sellers can come on to, and leave the market freely. This will lead to allocative efficiency and productive efficiency.

III. MONOPOLY- The opposite of perfect competition is monopoly. A monopoly is market where there is only one seller. The monopolist's prices exceed a marginal cost while a competitor's price equals marginal cost. This monopoly pricing leads to a transfer of wealth from a customer to the producer.

IV. OLIGOPOLY- In an oligopoly market there are only a few leading firms. Due to their small number they know each other's identity and recognise that they are affected by the output and pricing decisions of the others.

B. OTHER OBJECTIVES OF COMPETITION LAW-[13]

I. PROTECTING COMPETITORS AND FAIR COMPETITION- Competition laws which are aimed at a dispersal of power as a matter of ideology may favour small businesses and seek to protect them from big business. Instead of protecting the process of competition the tendency may be to protect competitors and the structure of the market. It is sometimes necessary to protect competitors in order to protect competition as a way of enhancing consumer welfare.

II. PRODUCTIVITY GROWTH- A leading American economist has argued that the primary goal of competition law should be the growth of the economy.

[12] *Alison Jones & B. E Sufrin, EC competition law (3 ed. 2008).*
[13] *Ibid.*

COMPETITION LAW IN INDIA

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy in the light of which the first Indian competition law was enacted in 1969 and was named as the Monopolies and Restrictive Trade Practices, 1969 (MRTP Act). Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing- [14]

1. That the ownership and control of material resources of the community are so distributed as best to sub serve the common good; and

2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Since attaining Independence in 1947,India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as Command-and-Control laws, rules, regulations and executive orders and the competition law of India, namely, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, for brief) was one such.[15] It was in 1991 that widespread economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles commenced its stride.

In the context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act, 2002. The new law is designed to repeal the MRTP Act.

ANTI-COMPETITIVE AGREEMENTS

Any agreement between the undertakings may be held to be anti- competitive. The agreement does not require a formal contract to be informed. 'Agreement' is defined and interpreted in a broad manner to include not only expressly written and formally entered into agreements but

[14] *Competition Act, 2002 And Its Relevance in India, Legalserviceindia.com (2017), http://www.legalserviceindia.com/articles/compet.htm (last visited Feb 13, 2017).*
[15] *Ibid.*

also implied, informal and unwritten agreements, which may include any arrangements or understanding or action in concert.

The intention of the parties to such an agreement regarding its enforceability is irrelevant. Even if the parties do not intend their arrangement or understanding or action in concert to be enforceable by legal proceedings, it may still be an agreement for the purposes of the Act.[16]

The term 'Agreement' is defined under sec 2(b) of the Competition Act, 2002.

Section 2 (b) - "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;

Agreements are anti-competitive if they affect competition adversely. Different phrases have been used in different jurisdictions regarding this. For eg. In the United States, agreements in 'restraint of trade' or 'attempt to monopolize' are punishable, whereas in the EU, if the 'object' or 'effect' of an agreement is prevention, restriction or distortion of competition, it may be held anti-competitive. In India the phrase used is 'appreciable adverse effect on competition'.

The concept of appreciable adverse effect has been in vogue since the MRTP Act 1969. In *Mahindra and Mahindra,* which came under the MRTP Act, the Apex Court observed that only where a trade practice has the effect, actual or probable, or restricting trade practice.[17] The Act is clear that while considering impact on competition, not only actual effect even probable effect should also be taken into consideration.

Under the MRTP Act, there was a provision relating to *de minimis*. In the entire scheme, the restrictive trade practices were presumed to be prejudicial to the public interests unless the MRTP Commission was satisfied of any or more of the circumstances specified under clauses (a) to (k) of sec.38.

In *Raymond Wollen Mills Ltd.* the Supreme Court observed that a court would be justified in passing an order on alleged restrictive trade practice only when it 'prejudicial to public interest' under Section 38 (1)(h), that is, it has impact on restricting competition to any 'material degree'. The court observed that in this case there were a number of manufacturers, including small-scale

[16] *T Ramappa, Competition law in India (2 ed. 2009).*
[17] *Mahindra and MahindraLtd. v. Union of India, A.I.R. 1979 S.C. 798 (India).*

manufacturers, and thus the little share of the complainant did not affect the competition in the relevant trade or industry to any material degree.[18]

Section 3 of the Competition Act 2002 provides that an agreement which 'causes or likely to cause appreciable adverse effect on competition in India' is prohibited and declares such an agreement as void. The act defines neither an anti-competitive agreements nor appreciable adverse effect on competition. The determination of appreciable adverse effect on competition is a question of fact to be determined in each case. Section 19(3) specifies the following factors that the CCI while determining 'adverse effect on competition' under Section3 should pay attention to.

Section 19 (3)-[19] The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

RULES FOR DETERMINING 'APPRECIABLE ADVERSE EFFECT' ON COMPETITION

Every restraint is not harmful and in order to determine the extent of harmfulness, the tests which were laid down by the United States were clearly recognised, adopted and applied in India through case law before the Competition Act 2002, was enacted.

The Supreme Court in *Mahindra and Mahindra* and *Tata Engineering* cases recognised, upheld and applied the two rules: rule of reason and *per se* rule.

RULE OF REASON-

[18] *Raymond Wollen Mills Ltd. v. Director General Comp. Cas. 1988 78 S.C. 471 (India).*
[19] *COMP ACT sec 19, subsec(3).*

The Chief Justice of the US Supreme Court, in *Standard oil v United States* observed that the way to decide whether a restraint was within the Sherman Act or not was to apply a 'standard of reason' and that only 'undue or unreasonable' restraint should be condemned.[20]

In *Board of Trade of City of Chicago* case the rule of reason was propounded and in this case, it was observed that "legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind. To restrain, is of their very essence".[21]

The rule of reason as defined in the above case requires inquiry into facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, history of restraint, the reason for adopting the particular remedy, the purpose or end south to be achieved.

PER SE RULE-

The Rule of Reason imposed heavy burden on the courts and as a result they soon adopted a strategy in which they began to recognise and hold certain types of agreements per se violative of Sherman Act. The court has in the case of *Northern Pacific Railway Co.*[22]Case held that "there are certain agreements which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborated inquiry as to the precise harm they have caused or the business excuse for their use."

The court in *Columbia Steel Co.* Case gave an example that where a complaint alleges that the defendants have engaged in price fixing or have concertedly refused to deal with non-members of an association or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial, because such restraints are illegal per se.[23]

Again in the *Tata Engineering and Locomotive Co.Ltd.* case, the court observed that section 38 of the 1969 Act provides that a restrictive trade practice shall be deemed to be prejudicial to the

[20]*Standard Oil v. United States 221 U.S. 1 (1911).*
[21]*Board of Trade of City of Chicago v. US 246 U.S. 231 (1918).*
[22]*Northern Pacific R ailway Co. v. United States 356 U.S. 1 (1958).*
[23]*United States v. Columbia Steel Co. 334 U.S. 495(1948).*

publicinterest unless the MRTP Commission, which is authorised to make inquiry, is satisfied of any one or more circumstances mentioned in this section.[24]

The Competition Act, 2002, prohibits and declares void under section 3 the agreements having appreciable adverse effect on competition. The condition is that the agreement should have an appreciable adverse effect on competition. The appreciable adverse effect is a question of fact to be determined in each case, and for that, the CCI has to take into consideration the factors specified under section 19(3). The factors specified by no means, supply the exhaustive list, and the CCI is free to look beyond these factors. Some of the factors that have been specified in section 19(3) include causing entry barriers; driving competitors out of the market and foreclosure of competition by hindering entry into the market; accrual benefits to consumers; improvements in production or distribution of goods or provision of services.

TYPES OF AGREEMENTS UNDER SECTION 3 OF THE ACT OF 2002

Section 3 categorises agreements into horizontal and vertical agreements. Horizontal agreements of the kind specified under section 3(3) are 'presumed to have an appreciable adverse effect on competition', whereas the vertical agreements of the kind specified under section 3(4) are anti-competitive if such agreements cause or is likely to cause an appreciable adverse effect on competition in India.

❖ HORIZONTAL AGREEMENTS

Horizontal agreements are agreements that are entered into between two or more firms operating at the same level of production or distribution in the market.[25] All horizontal agreements do not hurt competition. Certain horizontal agreements are beneficial, as they foster efficiencies, reduce risk, create new or improved products or methods of distribution or improve information flow and thereby the competitive functioning of a market. There is need to distinguish between pro-competitive effects and those having anti-competitive effect.

I. **CARTELS-** Certain types of horizontal agreements are also known as cartels. Cartel is defined under Section 2(c) of the Competition Act as - *"cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit*

[24] *Tata Engineering and Locomotive Co.Ltd v. Registrar of Restrictive Trade Agreements A.I.R. 1977 S.C. 973 (India).*
[25] *Alison Jones & B. E Sufrin, EC competition law (3 ed. 2008).*

control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.[26]

In *Hindustan Development Corporation,* it was observed that a cartel is an association of producers who, by agreement amongst themselves, attempt to control production to obtain a monopoly in any particular industry or commodity.[27]

In *Haridas Exports* case the Supreme Court held that "a cartel is formed, inter alia, with a view that the members of a cartel do not wage a price war and they sell at an agreed or uniform price."[28]

CONDITIONS CONDUCIVE TO FORMATION OF CARTELS

If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are:[29]

- a high concentration - few competitors
- a high entry and exit barriers
- a homogeneity of the products (similar products)
- a similar production costs
- a excess capacity
- a high dependence of the consumers on the product
- a history of collusion
- a active trade association

[26] *Provisions relating to cartels, cci.gov.in (2002), http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf (last visited Feb 11, 2017).*
[27] *Union of India v. Hindustan Development Corporation A.I.R. 1994 S.C. 988 (India).*
[28] *Haridas Exports v. All India Float Glass Manufacturers Association A.I.R. 2002 S.C. 2728(India).*
[29] *Provisions relating to cartels, cci.gov.in (2002), http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf (last visited Feb 11, 2017).*

REASONS WHY CARTELS ARE PROHIBITED-

Horizontal agreements are prohibited under competition law across the countries. They lead to wastage of society's resources, create inefficiency and injure consumer welfare. They protect members of the cartel from the full exposure to market forces, which leads to reduction in rivalry between competitors, which, in turn, leads to a loss of potential future competition.

SPECIFIC HORIZONTAL AGREEMENTS

Section 3(3) provides four categories of horizontal agreements that should be treated as prohibited- fixing prices, limiting supply of goods or services, sharing of market and bid rigging.

Section 3(3) in the Competition Act, 2002 - *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:

Provided that nothing contained in this sub-section shall apply to 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.

II. PRICE FIXING-

Price fixing is an agreement between business competitors to sell the same product or service at the same price. The agreement may be expressed or implied. It can also involve any agreement to fix, discount or stabilise price. The purpose of such cooperation is to push the

price of a product as high as possible in order to ensure profits for all involved. Price fixing is most harmful to consumers, who are forced to pay higher prices.

In *Swastik Stevedores Private Limited*[30] the opposite party is an association of dumper suppliers on Paradip Port. This is the only association and thus has monopolistic presence. The association is responsible for allocation of dumpers. The members of association are actually the owners of the dumpers and are engaged in the provisions of the service of the dumpers. It was alleged that the dumper service suppliers have colluded with each other through the association for fixing prices of dumpers for intraport transportation operations, which amounts to violation of Section 3(3) (a).

PRICE PARALLELISM – Price fixing is illegal only if it is intentional and takes place through communication or agreement between firms or individuals. It is not illegal for a firm to copy the price movements of a de facto market leader which is known as price leadership. This is known as conscious parallelism. Parallel pricing occurs if firms change their prices simultaneously, in the same direction, and proportionally.

In *The Alkali* case it was argued that "price parallelism is not a restrictive trade practice unless and until concert is proved. It was further argued that price parallelism is a regular feature of an oligopolistic industry, which is dominated by a few units, who keep an eye on the other's behaviour and change their actions accordingly without any concert with each other. The MRTP Commission held that mere identity of price increase between two units, even in the absence of any justification, such as increase in excise duty and/or increase in the cost of raw material, does not appear highly suspicious, and it is hard to believe that the frequent and equal increases in prices could have been carried out with some prior understanding."[31]

III. RESTRICTING OR LIMITING PRODUCTION, SUPPLY, MARKETS, TECHNICAL DEVELOPMENT, INVESTMENT OR PROVISION OF SERVICES (COLLECTIVE REFUSAL TO DEAL)

Apart from price-fixing, cartel can be formed through other methods also, which earns the colluding members supra-competitive profits, i.e., by way of restricting members' output. Section 3(3) of the Competition Act provides that "limits or controls production, supply,

[30] *Swastik Stevedores Private Limited v Dumper Owner's Association(2015) Comp. L.R. 212 (CCI) (India).*
[31] *The Alkali & Chem Corp of India (Bom), (1984) 3 Comp LJ 268 (India).*

markets, technical development, investment or provision of services be presumed to have an appreciable adverse effect on competition"[32]

Varca Druggist and Chemist case – 'This case was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr. Hemant Pai Angle and two other proprietors of pharmaceutical drugs and medicines firms before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (DGIR, MRTPC) alleging that the Opposite Party, namely, Chemist & Druggist Association, Goa (CDAG) was indulging in restrictive trade practices. The case was transferred to the CCI on the repeal of MRTP Act. The CCI comes to the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act.'[33]

In *Re Against Puja Enterprises and 10 others,* a reference has been filed by the DG&SD of the Department of Commerce against 11 opposite parties, alleging sharing of market and restricting the supply in contravention of Section 3(3)(b) and (c). The opposite parties in their bids quoted the maximum quantities that they could supply in that year. The issue was whether this restriction on supply was a result of collusion amongst the opposite parties. The CCI noted that the restriction on supplies had no connection with the installed capacity of the opposite parties. Thus, it concluded that such restriction can only be a result of the collusive action by opposite parties for mutual allocation of the market. This is violative of sec. 3(3) (b) & (c). The opposite parties failed to rebut the presumption by showing any benefits to the consumers or any improvement in production or distribution of goods etc.

IV. SHARING MARKETS

Competition between independent undertakings or companies may be eliminated in many other ways than through direct or indirect price fixing or limiting the supply of products. One of the common ways is to share the market. Market sharing or market division agreements may be either to share markets geographically or in respect of consumers or particular categories of consumers or of types of goods or services or in any other way.

[32] *COMP ACT. sec 3, sub.sec 3.*

[33] *Varca Druggist & Chemist v. Chemists & Druggists Association, Goa (CDAG), (2012) Comp. L.R. 838 C.C.I. (India).*

The case of *RRTA v. Crompton India Ltd. And Rallis (India)*[34]is an example of market sharing on the basis of product. Rallis manufactured pedestal and table fans while Crompton Greaves manufactured ceiling fans. They agreed that Rallis would not manufacture ceiling fans and Crompton Greaves would not manufacture pedestal and table fans. Geographical market sharing agreements sometimes prove to be more effective in eliminating competition than price fixing because the cost and difficulties in fixing and maintaining common prices are generally more than that involved in market sharing agreement. In any case, market-sharing agreements usually result in elimination of price competition. Market-sharing agreements are considered to be anti-competitive, as they reduce the choice available to customers in a competitive market.

V. BID RIGGING

Bid rigging generally means collusion amongst the bidders in order to keep the bid money at the predetermined levels. It is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tenders. Through bid rigging, bidders surrender their autonomy and independence to file bids. Bid rigging is a form of fraud and almost always results in economic harm to agency, which is seeking the bids, and to the public, who ultimately bear the costs as taxpayers or consumers.

Bid rigging or collusive bidding almost always results in higher prices and is beneficial to the contractors. Bid-rigging conspiracies, which may take many forms, usually fall into one or more of the following categories: bid suppression, complementary bidding, bid rotation and subcontracting.

Bid suppression is one in which one or more competitors are asked to refrain from bidding, or if one has already submitted a bid, they are asked to withdraw the bid so that the designated competitor's bid is accepted.

Complementary bidding occurs when some competitors agree to submit bids that either is too high to be accepted or contain special terms that will not be acceptable to the buyer. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

[34] *RRTA v. Crompton India Ltd. And Rallis (India) (1979) 49 Comp Cas 797 (India).*

Bid rotation, conspirators submit bids but take turns being the lower bidder, whereas in subcontracting, competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.

In *In Re, Aluminium Phosphide Tablets Manufacturers*[35], the CCI recognised that collusive tendering takes many forms. The firms simply agree to quote identical prices, the hope being that in the end each will receive its fair share of orders. This kind of tendering is normally not resorted to because it is extremely suspicious and is most likely to attract the attention of competition authorities.

In *In Re, Alleged Cartelization*[36], a letter was received from Senior Materials Manager, Diesel Loco Modernization Works, alleging cartel by SIL, FTRTIL and EL in response to a tender floated for procurement of feed valves. It was found that all the three companies quoted the same price by adopting different methods.

The CCI found that all the three bidders quoted the identical price, though showed a different method to arrive at that figure. It was also noted that two of the bids (of EL and FTRTIL) were deficient on one or the other aspect, although both were technically suitable. The CCI had observed that the two bidders had submitted complementary bids as they are not, as a matter of fact, competing with SIL in the procurement process. The CCI imposed a penalty on three contravening companies at the rate of 2 per cent of the average turnover of the company.

❖ VERTICAL AGREEMENTS

Vertical agreements are agreements between enterprises that are at different stages or levels or production chain and therefore in the different markets.[37] Vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings and that it can lead to reduction in the transaction and distribution costs of the parties and to an optimization of their sales and investment limits.[38] Five kinds of vertical agreements or restraints are recognised as anti-competitive in Sec 3(4) of the Competition Act. These are tie-ins, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance.

[35] *In Re, Aluminium Phosphide Tablets Manufacturers (2012) Comp. L.R. 753 (CCI) (India).*
[36] *In Re, Alleged Cartelization in the Matter of Supply of Spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab, (2014) Comp. L.R. 170 (CCI) (India).*
[37] *T Ramappa, Competition law in India (2 ed. 2009).*
[38] *Ibid.*

These agreements may be held anti-competitive if they cause an AAE on competition in India.

Section 3 (4) provides the list of vertical agreements.

Section 3 (4)-[39] *Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—*

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

In order to apply section 3(4) it is necessary that the enterprises must be at different stages or level of production chain in different markets in respect of provision of services. In many cases, the issue has arisen whether vertical agreements can be made out between the industry association and their constituent members. In all these cases, the CCI has denied such an arrangement/agreement to be one of vertical agreement.

I. TYING/TIE-IN ARRANGEMENT

It has been defined under Explanation (a) to Section 3(4) as *"tie-in arrangements" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.*

A tying arrangement may be described as an arrangement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. In case of tie-in arrangements, competition with regard to the tied product.

In *IELTS Australia,* the CCI observed that "in a tie-in arrangement, as a condition of purchase, a purchaser is also made to buy some other good. The main reason behind treating

[39] *Comp Act sec3 sub.sec.4*

tie-in arrangements being violative of competitive law is that it harms the consumer, as he is forced to buy a good that he may not necessarily want at the time of purchase of a good that he actually wants. Another effect of tie-in is that a low quality product may achieve a higher market share on account of ridership than otherwise it would have on merit."[40]

Every refusal to sell two products separately cannot be said to restrain competition. The essential requirement of an invalid arrangement lies in the seller's exploitation of its control over the tying product to force the buyer to the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms.

In *Mr. O. M. Debara, Hyderabad,* [41]it was contended that the loyalty discount scheme is another form of tie-in arrangement wherein the customer, in order to avail the loyalty discount, is forced at the time of purchase of his new car to sell his old existing car also.

The CCI rejected the contention and held that it is nothing but hypothetical and devoid of any merit. The purchaser of a new car is free to purchase a car of his choice, and it is not the case that the new car will not be sold to a customer unless he necessarily parts away with his old car also.

II. EXCLUSIVE SUPPLY/DISTRIBUTION AGREEMENT

Exclusive supply agreements are prohibited under section 3(4) (b) and (c) of the Competition Act. It is described under explanation (b) and (c) to section 3(4) as follows:

"(b)exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;"[42]

Exclusive supply contracts (ESC's) limit the number of buyers to whom a supplier sells its products. The exclusive supply agreements or requirement contracts have a number of economic advantages to the buyer as well as to the sellers; thus, these are indirectly advantageous to the consuming public.

[40] *IELTS Australia, (2011) Comp. L.R. 49 (CCI) (India).*
[41] *Mr. O. M. Debara, Hyderabad v. Society of Indian Automobiles Manufacturers (SIAM) and Ors, (2010) Comp. Cas. 17 (CCI) (India).*
[42] *COMP. ACT sec3, subsec(4),expln(b)*

Exclusive distribution agreement implies the agreement by the supplier to sell his products only to one distributor for resale in a particular territory. At the same time, the distributor is usually prevented from actively selling into other exclusively allocated territories.[43] The competition risks involved in exclusive distribution are mainly reduced intra-brand competition which may facilitate price discrimination and collusion both at the suppliers' and distributors' levels.

Exclusive supply arrangements includes an agreement which restricts in any manner the purchaser from acquiring, in the course of his trade, or otherwise dealing in any goods other than the goods of the seller. Distribution agreements however includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.[44] They have been defined under the Explanation (b) and (c) to subsection (4) of section 3 of the Competition Act 2002. Such agreements originate principally to cater to the manufacturers need to promote his branded product at all stages of distribution, down to the consumer. As a result of which, the competitors are prevented access to the market and the dealers are denied freedom to handle competing products. In this process, the consumer is also restricted in his choice among the number of competing products. In landmark verdict of *Telco v RRTA*, the Supreme Court observed that "exclusive dealership in this case did not impede competition rather promoted it because they led to specialization and improvement in after –sales services and by specialization in each make of vehicle and providing the best possible service, the competition between the various makes was enhanced. Wherein the exclusive arrangement was found to be essential for the survival of the respondent firm and competition, it was held that there is no affect on competition and therefore, it is not violative of law. When dealers are required not to deal directly or indirectly in sale of similar goods, it is then held to be restrictive in case of exclusive dealing."[45] In *Tata Engineering and Locomotive Co. v. Registrar of restrictive Trade Practices*, the Supreme Court did not find the distribution of areas between the company's distributors as being restrictive[46]. To sum it up, whenever there is a categorical condition in the agreement, which the purchaser shall not buy from any other party the specified products for

[43] *Alison Jones & B. E Sufrin, EC competition law (3 ed. 2008).*
[44] *Ibid*
[45] *Tata Engineering and Locomotive Co.Ltd v. Registrar of Restrictive Trade Agreements A.I.R. 1977 S.C. 973 (India).*
[46] *Ibid.*

sale or the terms of the agreement are shown to be on a principal to –principal basis, then they are held to be restrictive and reducing competition in the market.[47]

III. REFUSAL TO DEAL

Refusal to deal is defined in explanation (d) to section 3(4) as follows-

"(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;"[48]

'Refusal to deal includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. This standard business practice of manufacturers to deal with its dealers/stockists in a particular area and not to encourage direct inquiry from others based upon the economic consideration of minimising costs and does not amount to a restrictive trade practice under the 1969 Act. But sometimes refusal to deal is not quite genuine and is a part of discriminatory terms of sale and may prove to be more difficult than those accorded to other dealers.

In *RRTA v Bata India Ltd case* 'the defendants were engaged in the business of manufacturing leather and rubber canvas footwear, entered into agreements with small – scale manufactures for purchase of footwear to be sold by it under its own brand. The agreements prohibited these manufactures from purchasing raw material and components from parties other than those approved by Bata. It also required them to use the moulds sold/supplied by Bata exclusively for manufacturing for Bata's requirement. The Commission held that these conditions imposed by Bata is restrictive trade practices and prejudicial to public interest.'[49]

IV. RESALE PRICE MAINTENANCE

Resale price maintenance has been defined in explanation (e) to section 3(4) as follows-

"(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."[50]

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[47] *Competition Act, 2002 And Its Relevance in India, Legalserviceindia.com (2017), http://www.legalserviceindia.com/articles/compet.htm (last visited Feb 13, 2017).*
[48] *COMP. ACT sec3,subsec(4) expln(d).*
[49] *RRTA v Bata India Ltd (1976) 46 Comp. Cas.71(India).*
[50] *COMP. ACT sec3,subsec(4) expln(e).*

Resale Price Maintenance agreements require the buyer not to sell below or above a particular price or to sell at a particular agreed price. The price may be fixed either at the minimum level or maximum. Resale Price Maintenance denies the buyer the right to resell the goods at a price considered appropriate by him under the market conditions, as on sale, the seller has transferred the property in the goods sold to the buyer.[51]

In *Registrar of Restrictive Trade Agreements,* it was held that the clause fixing a uniform sale price for the respondent's footwear throughout India without indicating that the seller was entitled to sell below the price fixed was a restrictive trade practice and amounted to price line maintenance.[52]

In *Hindustan Level Ltd.,* it was argued that 'stipulated price could only be the fixed or standard prices dictated by the seller and neither maximum nor minimum prices which would permit variation in prices would be 'stipulated' price. It was further argued that maximum resale price is not 'stipulated price', and if there is no stipulated price, there is no need to state in the agreement that prices mentioned may be charged. The MRTP Commission observed that the word 'stimulate' means to mention or insist upon as essential part of the agreement and construed in this particular case, the mentioning of maximum retail price as 'stipulated' price.'[53]

[51] *T Ramappa, Competition law in India (2 ed. 2009).*
[52] *RRTA v Bata India Ltd (1976) 46 Comp. Cas.71(India).*
[53] *In Re, Hindustan Level Ltd., (1977) 47 Comp Cas 543.*

CONCLUSION-

Competition law should be enacted in order to protect the competition in the market and not the competitors. The MRTP Act neither defined nor mentioned any trade practice as restrictive trade practice. The Act hardly provided any provision which dealt with cartels, price fixing and collusions, refusal to deal or predatory pricing. Thus in the light of the expert recommendations there was a need for a competition law which would protect fair competition and control or try to eliminate anti-competitive practices. This had lead to the enactment of the Competition Act 2002. This act presumes the trade practices which are restrictive in nature to be anti-competitive. The Act provides a mechanism to deal with anti-competitive practices. The Act also defines different types of anti- competitive practices.

Under the Competition law, the term 'agreement' is defined in wide terms in order to include all kinds of agreements because the parties to the agreement often decide not to formalize their agreement, in fact sometimes they try to hide the agreement or any trace of it, especially in case of cartels. The Competition Act of 2002 has made an attempt to deal with anti competitive practices, but it has failed to define certain provisions which are used in the Act, like relevant market, market definition etc. The Act needs to address all the loopholes at the earliest in order to make the Act an effective legislation. Further, the Competition regulatory Authority must be properly equipped by the provisions of the Act so as to deal effectively with different kinds of anti-competitive practices.

BIBLIOGRAPHY

STATUTES-

1. Monopolistic and Restrictive Trade Practice Act, 1969
2. The Competition Act, 2002

BOOKS-

1. Alison Jones & B. E Sufrin, EC competition law (3 ed. 2008).
2. T Ramappa, Competition law in India (2 ed. 2009).
3. D. P. Mittal, Competition Law & Practice (3rd ed.).
4. Abir Roy & Jayant Kumar, (2008).
5. Avtar Singh & Harpreet Kaur, Competition Law (1st ed. 2012).
6. Versha Vahini, Indian Competition Law (2016).

WEBSITES-

1. Ranjana Iyer, Competition Law and Policy: A Brief Overview of the Indian Perspective |LawQuestLawquestinternational.com(2017),http://lawquestinternational.com/competition-law-and-policy-brief-overview-indian-perspective (last visited Feb 5, 2017).
2. Provisions relating to cartels, cci.gov.in (2002), http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf (last visited Feb 11, 2017)
3. Competition Act, 2002 And Its Relevance in India, Legalserviceindia.com (2017), http://www.legalserviceindia.com/articles/compet.htm (last visited Feb 13, 2017).