ANTI-COMPETITIVE AGREEMENTS UNDER COMPETITION LAW: A COMPARATIVE ANALYSIS IN INDIA, USA AND UK

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ABSTRACT

This research paper provides a comprehensive analysis of anti-competitive agreements under competition law in India, the United States, and the United Kingdom. It explores the legal frameworks, enforcement mechanisms, and key case studies in each jurisdiction, highlighting similarities and differences. The paper examines the approach to cartel behaviour, price fixing, bid rigging, and other antitrust violations in these countries. Through a comparative analysis, this research aims to shed light on the effectiveness of competition law in addressing anti-competitive agreements and fostering competitive markets.

Keywords: Anti-Competitive Agreements, Competition Law, Cartels, Price Fixing, Bid Rigging, India, USA, UK.

I. INTRODUCTION

Anti-competitive agreements are a significant concern in the field of competition law. They undermine the principles of fair competition, harm consumers, and hinder economic growth. In this research paper, we conduct a comparative analysis of how India, the United States, and the United Kingdom address anti-competitive agreements under their respective competition laws. Each jurisdiction has its unique legal framework, enforcement agencies, and precedents, which play a vital role in tackling such agreements.

II. LEGAL FRAMEWORKS

(A.) India: India had to adopt the policy of liberalization, privatization, and globalization (LPG) which liberalized the market economy of the country thereby making the market

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secretor of India face competition from both domestic as well as foreign companies. This development made it most necessary for India to build up an effective legal framework to promote justice in commercial matters which ultimately led to the enactment of the India Competition Act 2002.[2] However, the legacy of competition law dates back to the decade of 1960s when the Monopolies and Restrictive Trade Practices Act (MRTP) was passed in the year 1969. But later after the LPG reforms were introduced this particular legislation became inefficient to perform in a satisfied manner for which the Act of 2002 was enacted in the year 2003 establishing a new quasi-judicial body in the form of The Competition Commission in India to monitor the implementation of this Act.

The Competition Act, 2002 (the "Competition Act") was brought into effect in stages from 2002 to 2011. The Competition Commission of India (the "CCI") was established during this period to administer the Competition Act. The Competition Act also empowered the CCI with an enlarged role and extensive punitive powers as compared with the erstwhile Monopolies and Restrictive Trade Practices Commission.[3]

It is obvious from the above that competition in the market forces are to be regulated in India by the Competition Act of 2002 for which Section 3 of the said Act prohibits Anti-Competitive Agreements. This section deals with two types of Agreements, via- Horizontal Agreements which are amongst the Competitors, and Vertical Agreements which are related to the potential or actual relationship of purchasing and selling to each other. Under this Act, an Anti-Competitive Agreement will include all agreements entered into by association, enterprises, or persons that have an appreciable adverse effect on competition (AEC) within India in respect of the acquisition, control of goods, distribution, production, provision of services, etc. and thereby they are prohibited.

Types of Anti-Competitive Agreements:[4] (A) Horizontal Anti-Competitive Agreements [Section 3(3)], Horizontal Agreements are those agreements entered into by persons that are engaged in 'identical or similar trade of goods or provision of services. The agreements are between two or more individuals or enterprise operating at the same level of production activity in the economic processes.

Types of Horizontal Anti-Competitive Agreements:

[2] Nature of Anti-Competitive Agreement Law in India: A Brief Review by Jayanta Boruah :: SSRN (Last Accessed: - 06 November 2023, 9.35.30 PM)
[3] National Law School of India Review, Volume 24, Issue 2, Article 3, 2013, Pg. No. 03 (Last Accessed: - 07
[4] International Journal of Current Advanced Research Vol 7, Issue 2(E), pp 9967-9973, February 2018 (Last Accessed: - 07 November 2023, 9.40.33 PM)

1. Price-Fixing Agreements [Section 3(3)(a)]

2. Limiting or Controlling Production and Investment [Section 3(3)(b)]

3. Market Allocation and Sharing [Section 3(3)(c)]

4. Bid Rigging or Collusive Bidding [Section 3(3)(d)]

(B) Vertical Anti-Competitive Agreements [Section 3 (4)], Vertical Agreements are the arrangements entered into between enterprises or persons that are at different stages or levels of the production chain and in a different market. These are the agreements between non-competitors.

Types of Vertical Agreements:

1. Tie-in Agreements [Section 3(4)(a)]

2. Exclusive Dealing Agreement [Section 3(4)(b)]

3. Exclusive Distribution Agreement [Section 3(4)(c)]

4. Refusal to Deal [Section 3(4)(d)]

5. Resale Price Maintenance [Section 3(4)(e)]

(B) USA: The Sherman Anti-Trust Act of 1890 was the first measure passed by the U.S. Congress to prohibit trusts. It was named for Senator John Sherman of Ohio, who was a chairman of the Senate Finance Committee and the Secretary of the Treasury under President Hayes. The Sherman Anti-Trust Act passed the Senate by a vote of 51–1 on April 8, 1890, and the House by a unanimous vote of 242–0 on June 20, 1890. President Benjamin Harrison signed the bill into law on July 2, 1890.

At the time, public hostility was growing toward large corporations like Standard Oil and the American Railway Union, which were seen as unfairly monopolizing certain industries. Consumers felt they were hit with exorbitantly high prices on essential goods, while

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competitors found themselves shut out because of deliberate attempts by large corporations to keep other enterprises out of the market[5]

This signaled an important shift in the American regulatory strategy toward business and markets. After the 19th-century rise of big business, American lawmakers reacted with a drive to regulate business practices more strictly. The Sherman Antitrust Act paved the way for more specific laws like the Clayton Act. Measures like these had widespread popular support, but lawmakers genuinely wanted to keep the American market economy broadly competitive in the face of changing business practices.

The act was designed to restore competition, but it was loosely worded and failed to define such critical terms as "trust," "combination," "conspiracy," and "monopoly[5]."Late-19th-century legislators' understanding of trusts is different from our current concept of the term. During that time, trusts became an umbrella term for any sort of collusive or conspiratorial behaviour that was seen to render competition unfair. The term trust has evolved over the years, though. Today, it refers to a financial relationship in which one party gives another the right to hold property or assets for a third party.

Those found guilty of violating the Sherman Act can face a hefty punishment. It is also a criminal law, and offenders may serve prison sentences of up to 10 years. Beyond that, there are also fines, which can be up to $1 million for an individual and up to $100 million for a corporation. In some cases, heftier fines could also be issued, worth twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims.[6]

Both the FTC (Federal Trade Investigation) and the U.S. Department of Justice (DOJ) Antitrust Division enforce the federal antitrust laws. In some respects, their authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts. In this

guide, "the agency" means either the FTC or DOJ, whichever is conducting the antitrust

[5] https://www.investopedia.com/terms/s/sherman-antiturst-act.asp (Last Accessed: 07 November, 2023, 9.50.54 PM)
[6] Ibid

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investigation.[7]

If a consent agreement cannot be reached, the FTC may issue an administrative complaint and/or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge: evidence is submitted, testimony is heard, and witnesses are examined and cross- examined. If a law violation is found, a cease and desist order may be issued. An initial decision by an administrative law judge may be appealed to the Commission.

Final decisions issued by the Commission may be appealed to a U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court. If the Commission's position is upheld, the FTC, in certain circumstances, may then seek consumer redress in court. If the company violates an FTC order, the Commission also may seek civil penalties or an injunction.[8]

In some circumstances, the FTC can go directly to federal court to obtain an injunction, civil penalties, or consumer redress. For effective merger enforcement, the FTC may seek a preliminary injunction to block a proposed merger pending a full examination of the proposed transaction in an administrative proceeding. The injunction preserves the market's competitive status quo. The DOJ also has sole antitrust jurisdiction in certain industries, such as telecommunications, banks, railroads, and airlines. Some mergers also require approval of other regulatory agencies using a "public interest" standard. The FTC or DOJ often work with these regulatory agencies to provide support for their competitive analysis.[9]

(C) UK: In the UK, competition law is formed by two major acts: The Competition Act 1998 and the Enterprise Act 2002 (as amended in 2013 by the Enterprise and Regulatory Reform Act 2013), which together form the legal framework for regulating and governing competition in UK markets.

In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a

[7] The Enforcers | Federal Trade Commission (ftc.gov) (Last Accessed: - 07 November 2023, 10.30.23 PM)

[8] Ibid

[9] https://www.ftc.gov/about-ftc/mission/enforcement-authority (Last Accessed: - 10.36.56 PM)

dominant position by a business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover.[10]

The Competition Act 1998 aims to regulate: (I) agreements between enterprises which might prevent, restrict or distort competition in the UK; and (II) the abuse of a dominant position in the market which could have an effect in the UK. The companies concerned do not need to be based in the UK to be caught by the 1998 Act.

The Enterprise Act 2002 aimed to 'modernise UK merger control by restricting ministerial involvement in merger decisions.' It was amended by the Enterprise and Regulatory Reform Act in 2013 which created the CMA.

In the UK, a non-ministerial department called the Competition & Markets Authority ('CMA') is responsible for promoting competition and investigating anti-competitive behaviour.[11]

The CMA's responsibilities are wide and diverse, extending to:

(A) Investigating when organisations merge to ensure that this doesn't serve to reduce the amount of competition in that sector

(B) Auditing entire markets to check that the competitive process is operating effectively to the benefit of consumers

(C) Acting against cartels or culprits of anti-competitive behaviour, including imposing fines of up to 10% of UK Group turnover and seeking prison sentences against Directors.

(D) Individuals or businesses concerned about anti-competitive behaviours can report directly to the CMA, though it will typically be more effective if such complaints are properly reasoned.

Chapter I of the Competition Act bans agreements between businesses that might prevent, restrict or distort competition within the UK. Agreements that fall under this section of the act include those which look to fix the price of goods or services, limit the rate of production, share or divide markets or that try to discriminate between customers, for example.

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[10] Cartels and the Competition Act 1998: A guide for purchasers, pg. no 01-05, (Last Accessed: - 07 November 2023, 10.45.30 PM)

[11] https://www.360businesslaw.com/blog/competition-law-in-the-uk-explained/ (Last Accessed: - 07 November 2023,10.58.43 PM)

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crutially, agreements don't have to be formal or written to fall under the Act. Even informal verbal agreements or understandings can be regulated by the Act.[12]

III. ENFORCEMENT MECHANISMS

(A) India:

(1.) Role and powers of CCI: To promote and maintain market competition and protect consumers' interests, the Competition Commission of India (CCI) has been endowed with extensive powers under the Competition Act. These powers enable the CCI to investigate anti-competitive agreements, approve or scrutinise mergers and acquisitions, and establish regulations consistent with the provisions of the Competition Act.

Under Section 19 of the Competition Act, the CCI has the authority to inquire into agreements made by enterprises intending to abuse their dominant position in the market. These agreements encompass various anti-competitive practices, such as price-fixing agreements, exclusive supply agreements, and agreements that create barriers to entry for new players.

The CCI can initiate inquiries into such matters either on its own or based on complaints received. When anti-competitive agreements are identified, the CCI can review them and take appropriate actions to ensure fair competition and protect consumer rights. The CCI also has the power to approve or inspect mergers and acquisitions that may lead to the formation of a monopoly or grant a company a dominant position in the market. The CCI can impose penalties, this is mentioned under Chapter VI of the Competition Act, 2002 from section 42 to 48C.

By actively investigating anti-competitive agreements, inspecting mergers and acquisitions, and establishing regulations, the CCI ensures fair competition and protects the rights of consumers. When wielded effectively, these powers contribute to the growth of a robust and healthy market economy in India.

[12] Ibid

 ISSN: 2584-0649

(2.) Process of Investigation and Adjudication under Competition Law in India:[13]

Filing of Complaint: - The process of competition law in India begins with the filing of a complaint with the CCI. The complaint can be filed by any person, including a consumer, a competitor, or an industry association. The complaint must contain the details of the alleged anti-competitive practice and the parties involved.

Preliminary Investigation: - Once the complaint is received, the CCI conducts a preliminary investigation to determine whether there is a prima facie case of anti-competitive practice. If the CCI is satisfied that there is a prima facie case, it may direct the Director- General (DG) to conduct a detailed investigation.

Detailed Investigation: - The DG is responsible for conducting a detailed investigation into the alleged anti-competitive practice. The DG has the power to summon witnesses, call for documents, and conduct inspections of the premises of the parties involved.

Show Cause Notice: - Based on the findings of the investigation, the CCI may issue a show- cause notice to the parties involved. The show cause notice contains the details of the alleged anti-competitive practice and the evidence gathered during the investigation.

Hearing: - The parties involved have the opportunity to respond to the show cause notice and present their case before the CCI. The CCI may also hold oral hearings to clarify any issues that may arise during the proceedings.

Decision: - After considering the evidence and arguments presented by the parties, the CCI may pass an order either dismissing the complaint or finding the parties guilty of anti-competitive practices. The CCI has the power to impose penalties on the parties involved, including fines and directions to cease and desist from the anti-competitive practice.

Appeal: - The parties involved may appeal against the decision of the CCI to the National Company Law Appellate Tribunal (NCLAT). The NCLAT has the power to set aside or modify the decision of the CCI.

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[13] https://www.legalserviceindia.com/legal/article-11019-process-of-competition-law-in-india.html#:~:text=Preliminary%20Investigation%3A,to%20conduct%20a%20detailed%20investigation. (Last Accessed: - 07 November, 2023, 11.21.03 PM)

(B) USA:

Role and Powers of FTC and DOJ:[14] The Federal Trade Commission Act of 1914 created the Federal Trade Commission (FTC) and gave it concurrent power to enforce the Sherman and Clayton Acts through use of civil remedies. Only the courts, acting in response to charges brought by the Department of Justice (DOJ), have the power to impose the criminal penalties authorized by the antitrust acts. Generally, FTC has the same powers as DOJ but it also has three unique powers. (1) the power to enforce a statutory prohibition on unfair methods of competition, and unfair or deceptive acts or practices; (2) the power to obtain a court order temporarily enjoining conduct that violates the antitrust laws by meeting a standard that is less demanding than the standard DOJ must meet to obtain such an order; and, (3) the power to conduct hearings to decide whether a firm has violated the antitrust laws in-house before one of the FTC's Administrative Law Judges (ALJ) instead of asking a court to make that decision.

The first unique power has rarely been used. FTC uses the second and third powers with great frequency but both are controversial. After decades of controversy and uncertainty, a consensus developed among U.S. enforcement agencies and federal courts about forty years ago that the antitrust laws should be interpreted and implemented to maximize social welfare through application of principles of microeconomics. As a result, they are implemented with the goal of protecting the performance of competitive markets and not with the goal of protecting competitors.

That distinction has important implications. Thus, for instance, U.S. antitrust law recognizes that so-called "predatory pricing" should not be discouraged because it is almost always a symptom of a properly performing competitive market, and that price discrimination often has beneficial effects on the performance of a market.

(C) UK:

Role and Powers of CMA:[15] **-** They help people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour in a number of

[14] Comparing the Competition Law Regimes of the United States and India: Richard J. Pierce Jr, George Washington University Law School, 2017, pg. no. 01-18

[15] https://www.gov.uk/government/organisations/competition-and-markets-authority/about#our- responsibilities (Last Accessed: 07 November,2023, 11.45.23 PM)

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ways:

By investigating mergers that have the potential to lead to a substantial lessening of competition. If a merger is likely to reduce competition substantially, the CMA can block it or impose remedies to address those concerns.

They can act against businesses and individuals that take part in cartels or anti-competitive behaviour, protect people from unfair trading practices, including in cases where unfair treatment suggests there may be a systemic market problem. They can help in carrying out investigation of the entire markets if they are of the opinion that competition or consumer problems are increasing rapidly.

By encouraging government and other regulators to use competition effectively on behalf of consumers and carry out regulatory appeals in relation to issues like price controls, provide information and advice to people and businesses about rights and obligations under competition and consumer law.

Provide technical advice, reporting and monitoring in relation to the UK internal market, through the Office for the Internal Market and Subsidy Advice Unit.

The Competition and Markets Authority (CMA) is an independent non-ministerial department. Our work is overseen by a Board, and led by the Chief Executive and senior team. Decisions in some investigations are made by independent members of a CMA panel.

IV. Comparative Analysis and some Case Studies (India, USA and UK):[16]

(A) Comparative Analysis: - Globalization and economic reforms paved the way for open competition all over the world. The governing mechanism tasks are not only to regulate monopolies and anti-competitive practices, but also to ensure free and fair competition by providing equal opportunities for all players in the market coming from all over the world.

The study of Anti-Competitive Agreements as under Section 3 of the Indian Competition Act, 2002 as the laws existing in different nations on anti-competitive agreements, particularly in, USA and UK law would be useful because competition law in these

[16] International Journal of Current Advanced Research Vol 7, Issue 2(E), pp 9967-9973, February 2018 (Last Accessed: - 08 November 2023, 4.40.08 PM)

countries is considerably higher set than India's.

Competition Law in the USA, Competition Law is recognized as anti-trust law in the USA. The anti-trust laws describe the illegal practice in general terms, leaving it to the court to decide what particular practices are illegal based on the facts and circumstances of each case. The object of anti-trust laws is to protect the free-market conduct of business corporations and to foster enough competition for the interest of consumers. In the USA, it is mainly followed by The Sherman Act 1890, and The Federal Trade Commission Act 1914.

Competition Law in the UK, the two most notable acts enacted by the UK for the forbidden of anti- agreements and restraint of trade by an illegal way, which has harmful effect on competition. The first law relating to competition in the UK is the Competition Act, 1998 and other is The Enterprise Act, 2002.

(B) Case Studies: - India

(1.) Builders Association of India v. Cement Manufacturers Association and Other,[17] there was a landmark decision by CCI has forced a penalty of over Rs 6,000 Crores on 11 leading cement producers in the wake of discovering them liable for forming cartels to control "costs, production and supply" of cement in the market. According to the CCI order, it found that cement manufacturers were infringing the provision of the Competition Act. The CCI circulated the order after "investigation by the Director General of information recorded by the Builders Association of India.

(2.) Shri Shamsher Kataria v. Honda Siel Car India Ltd. & Ors.,[18] Wherein it discovered 14 automobile organizations blame worthy of anti-competitive practice, to infringement of Section 03(4) and Section 4 of the Competition Act, 2002 and forced upon them a huge penalty of INR 2544.65 Cores. The CCI for the first time examined and passed an order on vertical agreements and forced the biggest punishment of the year.

USA

(1.) ***TFT-LCD (Flat Panel) Antitrust Litigation, U.S. District Court, Northern District of California, No. 07-md-01827 also known as: - LCD Price Fixing case,***[19] A few days after

[17] Case No. 29 of 2010.
[18] Case No. 03 of 2011.
[19] https://www.fbi.gov/news/stories/lcd-price-fixing-conspiracy (Last Accessed: 08 November,2023, 5.15.21

the terrorist attacks of 9/11, top-level executives from a number of Asian manufacturers of LCD panels met secretly in a Taiwan hotel room and agreed to a plan to fix the prices of LCDs in the U.S. and elsewhere.

During subsequent monthly meetings, group members exchanged production, shipping, supply, demand, and pricing information on LCD panels used in computer notebooks, monitors, and flat-screen TVs. Participants agreed on prices and would then sell their products at these prices to some of the world's largest technology companies who used LCD panels in their products.

During the same time period, senior-level employees of AU Optronics Corp. regularly exchanged information with its Houston-based subsidiary—AU Optronics Corp. America— on sales of LCD panels for the purpose of monitoring and enforcing adherence to the prices agreed upon by other LCD manufacturers in the U.S.

Therefore, AU Optronics Corporation—the largest Taiwanese producer and seller of LCD panels—and two of its former top executives were sentenced for their roles in this conspiracy. The company was ordered to pay a $500 million criminal fine, and the executives each received three years in federal prison.

UK

(1.) ***On 07 December,2007, The UK's biggest supermarket, Tesco, Morrisons and the dairy group Lactalis McClelland***[20] were alleged to have broken the law by fixing the price of dairy products, but do not accept liability. However, they did make representations to the OFT (The Office of Fair Trading, who is responsible for protecting consumer interests throughout the UK) before making a final decision. The supermarkets and several dairy companies fell afoul of the Competition Act 1998, which prevents businesses from colluding in a way that harms competition in the UK. The OFT reported that customers were being charged 15 penances extra for a quarter-pound of butter, the same for a half-pound of cheese and 3 penance extra for a pint of milk.

The supermarkets Tesco, Morrisons and the dairy group Lactalis McClelland agreed to pay the Treasury near-record fines of more than £116m after admitting that they fixed the price of milk, cheese and butter in a scandal estimated to have cost consumers about £270m (As per 2007 estimates).

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[20] https://www.theguardian.com/business/2007/dec/08/supermarkets.asda (Last Accessed on: 08 November, 2023, 6.05.34 PM)

V. CONCLUSION

Competition in the markets brings various benefits by enhancing efficiencies, incentivizing innovation and increasing consumer welfare. The consumer also benefits through wider choice, better products and services and more competitive prices. Competition law through the promotion and preservation of competition in markets thereby enhances consumer welfare. This is, therefore, one of the aims and justifications for competition law. Countries like India, to whom the concept of competition law is relatively new should ensure a pro-consumer environment and provide consumers with a choice of competing products and services, while consumer protection law should enable the consumers to exercise that choice effectively free from inhibiting factors such as fraud, coercion, deception or false information.

Moreover, Competition law authorities should remain alert to developments in consumer protection policies that impact competition, and as part of their competition advocacy role should suggest changes that will have minimal adverse impact on competition.[21] On the other hand, consumer protection authorities need to have a better appreciation of how competition itself can resolve many consumer problems, thereby reducing the burden on competition policy to make direct interventions on behalf of the consumer, which can sometimes be quite costly.

[21] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT: The effects of anti-competitive business practices on developing countries and their development prospects by: - HASSAN QAQAYA and GEORGE LIPIMILE, 2008. Pg. No. 01-42