Anti Competitive Agreements

It is provided under Section 3(1) of the Competition Act that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. Section 3(2) further declares that any anti Competitive agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as 'void' if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including "cartels", engaged in identical or similar goods or 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 ofgeographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and
(d) directly or indirectly results in bid rigging or collusive bidding; shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant.

The explanation appended to the Section 3 defines the term 'bid rigging' as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Efficiency enhancing joint ventures entered into by parties engaged in identical or similar goods or services, shall not be presumed to have appreciable adverse effect on competition but judged by rule of reason. The term "cartel" used in the Section is the most severe form of entering into 'anti competitive agreements' and has been defined in Section 2(c).

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such predetermination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Bid rigging is anti-competitive

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:

- *agreements to submit identical bids*
- *agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)*
- *agreements not to bid against each other,*
- *agreements on common norms to calculate prices or terms of bids*
- *agreements to squeeze out outside bidders*
- *agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis*

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Section 3(4) provides that 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 Resale price maintenance, Refusal to deal, Exclusive supply agreement and Exclusive distribution agreement 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.

The term **"tie-in agreement"** includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. A good example of tie-in agreement is where a gas distributor requires a consumer to buy a gas stove as a pre condition to obtain connection of domestic cooking gas. [*Chanakaya and Siddharth Gas company, In-re RTP 11/1985* decided by (MRTP Commission on 27.1.1985)]

"Exclusive supply agreement" includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Thus, where a manufacturer asks a dealer not to deal in similar products of its competitor directly or indirectly and discontinues the supply on the ground that dealer also deals in product of suppliers' competitor's goods is an illustration of exclusive dealing agreement. [*Bhartia Curtec Hammer Ltd. In-re* (1997) 24 CLA 104 (MRTPC)]

"**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. Requiring a distributor not to sell the goods of the manufacturer beyond the prescribed territory is a good example of exclusive distribution agreement. Vadilal Enterprise Ltd. In-re (1998 (91) COMP CAS 824 is a good example of exclusive distribution agreement.

"**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. For eg. an agreement which provides that the franchisees will not deal in products or goods of similar nature for a period of three years from the date of determination of agreement within a radius of five kms from showroom amounts to exclusive dealing agreement. *DGIR v. Titan industries* (2001) 43 CLA 293 MRTPC.

"**Resale price maintenance**" includes any agreement to sell goods on condition that the prices to be charged on 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.
Any stipulation that the cement dealer should not sell below the stipulated price is a 'resale price maintenance' practice and is an anti competitive practice. (In re-India Cement Ltd. RTP Inquiry 48 /1985).
The agreements falling in Section 3(3) shall be presumed to have appreciable adverse affect on competition and thereby they are construed as deemed restrictive agreements. The agreements falling in Section 3(4) shall be judged by rule of reason and the onus lies on the prosecutor to prove its appreciable adverse effect on competition. The definition of all restrictive concepts covered under Section 3(4) is inclusive one.
Moreover, Section 3 does not restrict the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under
(a) the Copyright Act, 1957;
(b) the Patents Act, 1970;
(c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
(e) the Designs Act, 2000;
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

That apart, the Act does not restrict any person's right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of 'export business' is in view of 'effect theory', and doctrine of 'relevant market'.

WHAT IS AN ANTI-COMPETITIVE AGREEMENT?

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-

- *agreement to limit production and/or supply;*
- *agreement to allocate markets;*
- *agreement to fix price;*
- *bid rigging or collusive bidding;*
- *conditional purchase/ sale (tie-in arrangement);*
- *exclusive supply / distribution arrangement;*
- *resale price maintenance; and*
- *refusal to deal.*

Prohibition of abuse of dominant position

Section 4 of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to–

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour".
In line with the latest global trend, the dominance shall not be determined with reference to "assets", "turnover" or "market share".
As per Section 2(r) 'relevant market' means the market, which may be determined by the Commission with reference to the relevant 'product market' or 'relevant geographic market' or with reference to both the markets. Thus, for determining dominance, these are relevant concepts.
The term "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different

places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

For the purposes of this clause, “activity” includes profession or occupation; “article” includes a new article and “service” includes a new service; “unit” or “division”, in relation to an enterprise, includes—
(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
(ii) any branch or office established for the provision of any service.

Section 4(2) states that there shall be abuse of dominant position, if an enterprise or group
(a) directly or indirectly imposes unfair or discriminatory;
(i) condition in purchase or sale of goods or services; or
(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation appended to Section 4 (2) clarifies that the unfair or discriminatory condition in purchase or sale of goods or services shall not include any discriminatory condition or price which may be adopted to meet the competition.
Section 4(2)(b) includes in abuse of dominant position an enterprise or group limiting or restricting

(i) production of goods or provision of services or market therefore; or
(ii) technical or scientific development relating to goods or services to the prejudice of consumers.

Similarly Section 4 (2) (c), (d) and (e) specify three other forms of abuses namely, if any person indulges in practice or practices resulting in denial of market access in any manner; or makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts and also, if any person uses dominant position in one relevant market to enter into, or protect, other relevant market.
The term “predatory price” has been defined as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors. Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:
(i) selling goods or provision of service at a price which is below its cost of production and
(ii) that practice is resorted to eliminate the competitors or to reduce competition.

The Competition Commission of India has been empowered under Section 19(4) of the Act to determine whether any enterprise or group enjoys a dominant position or not, in the 'relevant market' and also to decide whether or not there has been an abuse of dominant position. It may be noted that mere existence of dominance is not to be frowned upon unless the dominance is abused.

WHAT CONSTITUTES ABUSE OF DOMINANCE?

Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes:

- *imposing unfair conditions or price,*
- *predatory pricing,*
- *limiting production/market or technical development ,*
- *creating barriers to entry,*
- *applying dissimilar conditions to similar transactions,*
- *denying market access, and*
- *using dominant position in one market to gain advantages in another market.*