



COMPETITION ACT- IMPACT ON RETAIL INDUSTRY AND ITS OVERVIEW

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❖ **ABSTRACT:**

This paper provides detailed information about the Impact of competition Law on Retail Industry. It explores the role of the Government of India in the industries growth and the need for further reforms. In India the vast middle class and its almost untapped retail industry are the key attractive forces for global retail giants wanting to enter into newer markets, which in turn will help the India Retail Industry to grow faster.

❖ **INTRODUCTION:**

Competition benefits everyone; businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services, from individual consumers to businesses, benefit by paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value.

Retail Industry plays a vital role in any Country, and especially in India. As retail industry considers as the key pillars in Indian economy, as it contribute around 10% in India's Gross Domestic Product (GDP).¹

Competition Commission act, excludes other various hindrance causing acts, which earlier industries need to take permission with various competent authorities, after Competition Act came into picture, every case and each permission will now be granted by this act. No industry without clearance of the Competition Appellate Tribunal can merge or amalgamate.

¹ Indian Brand Equity Foundation, Retail Industry in India, and its overview, Last Updated: October, 2018

OBJECTIVES OF ACT

- ✚ To promote healthy competition in the market.
- ✚ To prevent those practices which are having adverse effect on competition. ✚ To protect the interests of concerns in a suitable manner.
- ✚ To ensure freedom of trade in Indian markets.
- ✚ To prevent abuses of dominant position in the market actively.
- ✚ Regulating the operation and activities of combinations (acquisitions, mergers and amalgamation).
- ✚ Creating awareness and imparting training about the competition Act.

❖ **IMPACT:**

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and abuse. Market power is variously known in competition jurisdictions as dominant



position, monopoly power and substantial market power. The Competition Act, 2002 and amended in 2007 follows the philosophy of modern competition laws and aims at fostering competition, protecting Indian markets against anti-competitive practices by enterprises who always want market leadership to maximize benefits from the market for their progress. The Act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations which include mergers, amalgamations and acquisitions thus laying down certain practices from which enterprises shall have to keep away. Enterprises not following the law on competition will have to face penalty which will thwart activities and operation in the market.²

The Act prohibits anti-competitive agreements including cartels, abuse of dominant position, regulates combinations which includes mergers, amalgamations and acquisitions. An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements may include, but not limited to: (i) Horizontal Agreements to : (i) fix prices; (ii) limit production and/or supply; (iii) allocate markets; and (iv) bid rigging or collusive bidding. (ii) Vertical Agreements including: (i) conditional purchase/sale (tie-up arrangement); (ii) exclusive supply arrangement ; (iii) exclusive distribution arrangement; (iv) refusal to deal; and (v) re-sale price maintenance.

² Ibid;

Now when we talk about Competition

Commission act, there are some criticism also attach to it, like excess control of central government, Competition Commission bound to follow the direction issued by the central government, and central government can exempt any number enterprise from the CCI. And when central or state government is involved, then there are a chance of biasness comes into play.

Retail Industry is the only industry, where in the government of India permitted 100% foreign direct investment. Having Competition commission act in India has helped the small retailers from the international competitor from all over the

The Act intends to curb any activity that could harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. Therefore, the three broad areas for the Competition Act to look at are: (a) cartelizing behavior of the firms, (b) abuse of dominant position, and (c) mergers and acquisition.³

When Indian Government, allow 100% Foreign Direct Investment in Retail sector, the pressure on Indian retail industries arises from multifold. As competition from internal as well as external competitors tends to rise with this step of government, thus there is an emergence need of competition act, from preserving the retail industry from malpractices adopted by some countries. Entering of Wal-Mart in India, tends to raise a competition to a very different level, thus protection of Indian retailer is necessary.

Competition Act undoubtedly promotes efficiency and accountability of the players' ample choices for the consumer and



ultimately leading to welfare of customer and enterprise both. Retail business are now cannot charge different price from different customer, the prices need to be well settled and equal for all. Various retailers were not happy with this competition act, as earlier they were indulge in entering exclusive dealing agreement.

In the case of **Ahuja vs. Snap Deal**⁴, Ashish Ahuja used to sell various products through Snapdeal, in the process of which he used to purchase SanDisk products from open market and sell them through Snapdeal. Snapdeal eventually refused to sell these products and took them off

³ Competition Law in India: perspective, Vishwas Pingali, Faculty, Economics Area, Ahmedabad, Last Updated: June, 2016

⁴ Competition Commission of India, Case No 17 of 2014.

its website. Mr Ashish Ahuja was informed that SanDisk had given a list of authorized channel partners and only such partners could sell SanDisk products through Snapdeal.

Snap Deal forcing him to sell only particular product, and refusal from Ahuja side, will going to stopping the supply of sand disk product.

Snap Deal was charged by CCI, for using his Dominant position in market for mode of the sale, thus preventing Ahuja from offering competitive prices for same product.

The famous Wal-Mart effect on retail sector,

when Wal-Mart enters in India, Small retailers threatened with this entry in market due to stiff competition and chances of survival were less. Now we have to understand this thing that Retail also include E-Commerce, but not all of it, at least 10% of E-Commerce is retail⁵. In case of **Mohit Manglani v. Flipkart**⁶ India Private Limited & Ors, (Case No. 80/2014) the five major e-commerce portals in India namely; Flipkart, Snapdeal, Amazon, Jabong and Myntra were alleged to have contravened the provisions of the Competition Act, 2002. Here the informant alleged that the e-commerce portals entered into exclusive agreements in order to sell selected products exclusively through their portal and excluded other e-commerce portals and physical channels. He further averred that these e-portals decide upon the terms of resale, sale price, quality or service conditions, terms of payment and delivery. Moreover, all these stipulations were non-negotiable in nature for the prospective consumers. Further the informant claimed that each of these e-commerce portals were dominant as they had 100 percent market for the product they chose to exclusively deal in. It was contended here that the relevant market constitutes the market in context of that particular product and dominance is also perceived accordingly.

E-Commerce is channel of distribution to the relevant market of retail.

❖ LIMITATION PERIOD

In **Nitin Radheshyam Agarwal vs. Competition Commission of India**⁷, it was argued that in the absence of prescription of



any period of limitation under the act, the commission cannot refuse to order an investigation into allegation of anti-competitive agreement, but that does not

⁵ E-Commerce is 10% Retail, Author: Steve Denis, Forbes, Last Updated: April 9, 2018

⁶ Competition Commission of India, Case No.80 of 2014

⁷ Appeal No.108/2015, order dated 14-12-2015 (CAT)

mean that the claim would be made even after unreasonable delay., what is reasonable time depend upon case to case.

❖ **DETECTION OF BID RIGGING OR COLLUSIVE BIDDING**

The main problem in checking the practices or arrangement of bid rigging or collusive bidding is how to detect the secret understanding between the parties in the absence of evidence. The problem becomes more acute; when the parties do not quote or bid the same rates but vary slightly with the intention that it should appear to other as if there has been no collusion. However, suspicion may be unusual bidding or something a bidder says or does certain patterns of bidding would be seen to be odds with a competitive market and suggest the possibility of collusion.⁸

Any agreement (in Collusion) not to respond to an initiation to tender until after discussion with other person invited to tender, is also a bid rigging offence⁹. Certain patterns in bids can give rise to suspicion of collusion. The competition

Commission of India has identified some situation of suspicious behavior to include the following:

✚ The bid offered by different bidders contains same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate the designated bid winner has prepared all other bids (of losers).¹⁰

✚ Bid Documents contain the same corrections and alteration indicating last minute changes. ✚ A bidder submits his/her bid and also the competitor's bid.

✚ A party submits multiple bids to a bid opening and submits his bid after coming to know who else is bidding.

✚ A bidder makes a statement indicating advance knowledge of the offers of the competitor. ✚ A bidder makes a statement that a bid is a 'Complementary' or 'Cover' bid.

✚ A bidder makes a statement that the bidders have discussed prices and reached an understanding.

⁸ Bid Rigging under the Competition Act, 2002.

⁹ Ibid;

¹⁰ Competition Act, 2002(Principles and Practices), by: Prof. Dr.V.K. Agarwal, 2nd Edition 2019

❖ **TYPES OF BIDS**

✚ **Identical Bids**

Some time parties agree to put in identical



bids for every job, each bidder receive fair share.

+ Cover Bids

Bidders makes an arrangement as who shall submits the lowest bid and rest shall submit ‘cover’ bids, so that designated bid will be accepted, these are known as complementary bidding.

+ Bid Suppression

The competitor agree not to bid against each

other, one or more bidder agree to refrain from bidding, or one who has agree to withdraw the submitted bid.

+ Bid Rotation

Competitors agree to designate the bid winner in advance on a rotational basis or on a geographical or customer allocation basis.

+ Protection bid

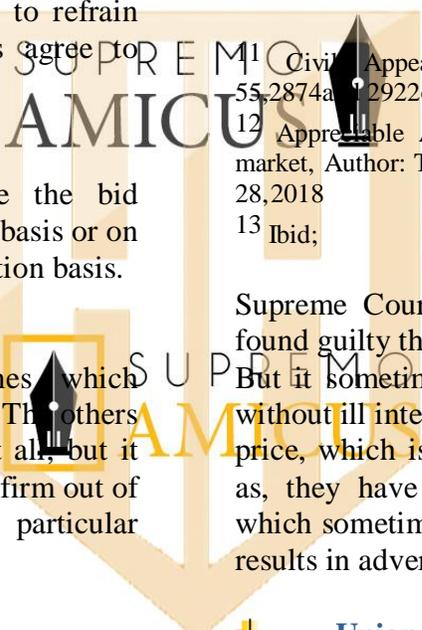
Sometime association determines which supplier it to receive the contract. The others then directed either not to bid at all, but it gives them protection that certain firm out of several quoting price for a particular customer obtains the contract.

❖ CASELAW:

**❖ Quoting Identical Price- may not be cartel
+ Excel corp. limited v/s Competition Commission of India¹¹**

Supreme Court held companies liable for quoting identical prices, which has adverse effect on the market.¹² Allegations of cartelization and bid rigging were also raised in this case where the issue before the

Supreme Court of India was whether the four manufacturers of Aluminium Phosphide Tablets had formed a cartel by entering into anti-competitive agreements amongst themselves since these manufacturers quoted identical rates for their products. The UNCTAD Competition Glossary defines bid rigging as “bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids”.¹³



¹¹ Civil Appeal No.2480 of 2014, No. 53-55,2874a, 2922of 2014 SC

¹² Appreciable Adverse Effects of Competition in market, Author: Tanya Varshney, Last Updated: June 28,2018

¹³ Ibid;

Supreme Court on circumstantial evidence found guilty the above companies.

But it sometime seen that, few companies, without ill intent on their part quote identical price, which is court and tribunal considers as, they have intention of creating a bid, which sometime not the real scenario, which results in adverse effect on market

+ Union of India vs. Hindustan Development Corporation¹⁴

The Supreme Court considered the questions whether quoting identical price or near-identical price by the seller/suppliers of the product cannot itself construed as an act of cartelization/bid- rigging etc. In this case the tender committee formed an opinion that 3 big manufacturer formed a cartel by quoting the identical price.



Court held that this was only a suspicion because merely quoting the same price does not mean formation of cartel/bid-rigging, quoting same price and lower price does not mean the same, thus these suspicions are not enough to conclude that they have formed the cartel.

✚ **Rail Coach Factory Kapurthala vs. Faively transport India Limited¹⁵**

In that case tribunal rejected the argument the allegation of formation of cartel by the respondent by observing the mere identity of price did not furnish the valid ground for holding the respondent liable.

We may say that in an oligopolistic market like the one in question, the identity of price quoted by the bidder is not an unusual feature. The players in the limited market are aware of the price quoted by each other, it is ordinary course of quoting the same price in response to next tender. Thus merely suspicion of quoting the same price and formation of cartel did not render it void.

❖ **MERITS:**

- ✚ Although competition forces lessen your market share, it can also force you to become a better business.
- ✚ Advantage for customer It's good to have choices. The number of competitors, the better the offer for customer.
- ✚ Promotes Economic Efficiency or best use of resources.

¹⁴ (1993) 3 SCC 499.

¹⁵ Appeal No.10/2016, order dated 17-02-2016 (CAT)

Act protect enterprises, but from creation of

monopoly in the market, with no price fixation in the market which is a very positive step in achieving a good competitive environment.

✚ Protection of small and medium enterprises, from getting dissuaded from the multinationals. ✚ Customer is benefitted due to Competition Policy.

✚ Lower prices for all, the simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. Not only is this good for consumers - when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general.

✚ Better Quality Competition also encourages businesses to improve the quality of goods and services they sell – to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better services.

✚ More choice in a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality.

✚ Innovation to deliver this choice, and produce better products, businesses need to be innovative – in their product concepts, design, production techniques, services etc.

✚ Better competitors in global markets Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.

❖ **DEMERTS:**

- ✚ Competition decreases your market share



and shrinks your customer base, especially if demand for your products or services is limited from the start¹⁶.

✚ Competition can be hard on businesses; it may harm companies you regularly support.¹⁷

✚ There are no clear rules or international standards on what constitute “fair” or “unfair” trade practices. Many jurisdictions assume that collusive agreements are per se bad and hence illegal; some subject these to the rule of reason.¹⁸

✚ An apparent overkill: Because of the diversity of factual circumstances in a market, the impact of business practices on competition cannot usually be pre-judged.¹⁹

¹⁶ Ibid;

¹⁷ Ibid;

¹⁸ Government Response, ‘Competition Policy’- The key to economic success

Even though dominance of the market by established players tends to make it more difficult for newcomers to compete, it is not the Government’s objective to specifically favour newcomers.

✚ Creates uncertainty in the competitive world.

✚ No emphasis given without intention parallel pricing, as it sometime coincidence that multiple enterprises quoted the same pricing, without having any ill intention on their part, but due to which they have to face burden of the act, which protect parallel pricing.

❖ **SOURCES OF INQUIRY**

Inquiry into certain agreement and

dominant position of enterprise

✚ Receipt of any information, in such manner and accompanied by such fee as may be determined by regulation, from any person, consumer or their association or trade association.

✚ A reference made by the central government or a state government or a statutory authority. ✚ Its own motion.

❖ **DIFFERENCE BETWEEN MRTP ACT AND COMPETITION ACT²⁰**

<u>BASIS</u>	<u>MRTP ACT</u>	<u>COMPETITION ACT</u>
<u>Meaning</u>	MRTP Act, is the first competition law made in India, which covers rules and regulations relating to unfair trade practices	Competition Act, is implemented to promote and keep up competition in the economy and ensure freedom of business.
<u>Nature</u>	Reformatory	Punitive
<u>Dominance</u>	Determined by firm's size.	Determined by firm's structure
<u>Focuses on</u>	Consumer interest at large	Public at large
<u>Offenses against principle of</u>	14 offenses	4 offenses



N.J		
Penalty	No penalty for offense	Offenses are penalized
Objective	To control monopolies	To promote competition
Agreement	Required to be registered	It does not specify any provision relating to registration of agreement
Appointment of Chairman	By the Central Government	By the Committee consisting of retired

the retail Industry covered under Section 3 of the Act are exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance. The prohibition of cartel agreements (price fixing, output restricting, market sharing or bid rigging) between enterprises or persons is the strongest provision in the Act however the act shall not apply in case such an agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods and provision of services. Having said this it must be noted that cartels may increase efficiency but alongside may also increase prices that may be detrimental to the consumers.

In short, the two acts are different in a number of contexts. MRTP Act has a number of loopholes and the Competition Act, covers all the areas which the MRTP Act lags. The MRTP Commission plays only advisory role. On the other side, Commission has a number of powers which promotes suo moto and levies punishment to those firms which affects the market in a negative way.

❖ **CONCLUSION**

Competition Act purpose is regulate market fairly, without any fraudulent practices on the part of enterprises, it seeks to maintain market competition by regulating anti competitive conduct by companies. Talking about retail industry, government and other institutions does not lay emphasis on this industry, while this industry contributes 10% to total Gross Domestic Product (GDP). The specific anti-competitive practices of

India has liberalized 100% Foreign Direct Investment (FDI) in its single and multiple brand retail industry , which results into higher level of competition in the market, thus chances of sucking the throats of small and medium retailers, thus need for such policy is very urgent to protect the same from dying from the market. Although this has proved very beneficial to customers.²¹

It can now be concluded that the competition Act, 2002 is landmark legislation. The main aim of this Act is to promote competition and curb all anti-competitive agreements. This Act restricts the abuses of dominant enterprises. It can also regulate any kind of combinations beyond a particular size. Thus this Act does not curb monopolies rather it curbs abuses of monopolies.

Thus, the competition Act is expected to play a responsible role in changing the control mechanism related to monopoly and restrictive trade practices and is also



expected to protect the interest of the small and medium industries in the country besides giving consumers more powers to redress their grievances.

21 Competition Law in Retail Sector, PVX
Law partners, Last Updated 20 June, 2018

