ANTI-COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT

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Section 3 of the Competition Act, 2002

The Act under Section 3(1) prevents any enterprise or association from entering into any agreement which causes or is likely to cause an appreciable adverse effect on competition (AAEC) within India. The Act clearly envisages that an agreement which is contravention of Section 3(1) shall be void.

**How to determine AAEC?**

The Act provides that any agreement including cartels, which-

Directly or indirectly determines purchase or sale prices;

Limits production, supply, technical development or provision of services in market;

Results in bid rigging or collusive bidding

Shall be presumed to have an appreciable adverse effect on competition in India

Proviso to Section 3 of the Act provides that the aforesaid criteria shall not apply to joint ventures entered with the aim to increase efficiency in production, supply, distribution, acquisition and control of goods or services.

Anti-competitive agreements are further classified into Horizontal agreements and Vertical agreements.

**What are Horizontal Agreements?**

Horizontal agreements are arrangements between enterprises at the same stage of production. Section 3(3) of the Act provides that such agreements includes cartels, engaged in identical or similar trade of goods or provision of services, which-

Directly or indirectly determines purchase or sale prices

Limits or controls production, supply

Shares the market or source of production

Directly or indirectly results in bid rigging or collusive bidding

Under the Act horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive. This is also known as ‘per se’ rule. This implies that if there exists a horizontal agreement under Section 3(3) of the Act, then it will be presumed that such an agreement is anti-competitive and has an appreciable adverse effect on competition.

**What are Vertical Agreements?**

Vertical agreements are those agreements which are entered into between two or more enterprises operating at different levels of production. For instance between suppliers and dealers. Other examples of anti-competitive vertical agreements include:

Exclusive supply agreement & refusal to deal

Resale price maintenance

Tie-in-arrangements

Exclusive distribution agreement

The ‘per se’ rule as applicable for horizontal agreements does not apply for vertical agreements. Hence, a vertical agreement is not per se anti-competitive or does not have an appreciable adverse effect on competition.

The Act under Section 3 of the Act also prohibits any agreement amongst enterprises which materialize in:

**Tie-in arrangement**

What is a tie-in arrangement?

According to the Statute it includes any agreement requiring purchaser of goods, as a condition of purchase, to purchase some other goods. In the case ofSonam Sharma v. Apple & Ors., the CCI stated that in order to have a tying arrangement, the following ingredients must be present:

There must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases the other product or service. In other words, the requirement is that purchase of a commodity is conditioned upon the purchase of another commodity.

The seller must have sufficient market power with respect to the tying product to appreciably restrain free competition in the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product; and

The tying arrangement must affect a “not insubstantial” amount of commerce. Tying arrangements are generally not perceived as being anti- competitive when substantial portion of market is not affected.

**Exclusive supply agreement**- The Act defines such agreements to include 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.

**Exclusive distribution agreement**- This 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 goods.

**Refusal to deal**- The Act states that this criteria includes agreement which restricts by any method the persons or classes of persons to whom the goods are sold or from whom goods are bought.

***Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors***- Important case law on Anti-competitive Agreements

In the case ***of Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors******3***, the concept of vertical agreements including exclusive supply agreements, exclusive distribution agreements and refusal to deal were deliberated by the Commission.

Facts– The informant in the case had alleged anti-competitive practices on part of the Opposite Parties (OPs) whereby the genuine spare parts of automobiles manufactured by some of the OPs were not made freely available in the open market and most of the OEMs (original equipment suppliers) and the authorized dealers had clauses in their agreements requiring the authorized dealers to source spare parts only from the OEMs and their authorized vendors only.

CCI’s decision– The Commission held that such agreements were in the nature of exclusive supply, exclusive distribution agreements and refusal to deal under Section 3(4) of the Act and hence the Commission had to determine whether such agreements would have an AAEC in India.

The Commission held the impugned agreements were in contravention of Section 3 of the Act and remarked that the network of such agreements allowed the OEMs to become monopolistic players in the aftermarkets for their model of cars, create entry barriers and foreclose competition from the independent service providers.

The Commission further stated that such a distribution structure allowed the OEMs to seek exploitative prices from their locked-in consumers, enhance revenue margin form the sale of auto component parts as compared to the automobiles themselves besides having potential long term anti-competitive structural effects on the automobile market in India.

## COMPETITION APPELLATE TRIBUNAL

 In exercise of the powers conferred by Section 53A of the Competition Act, 2002, (‘Act’ for short)  the Central Government established with effect from 15th May, 2009, the Competition Appellate Tribunal (‘Tribunal’ for short) having its headquarters at Delhi vide Notification No. S.O.1240 (E), dated 15.05.2009.  The Tribunal is-

to hear the appeals against any direction issued or decision made or order passed by the Commission;

to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against the finding of the Commission or under Sec. 42A or under Sec. 53Q(2) of the Act and pass orders for the recovery of compensation under Section 53N of the Act.

### COMPOSITION OF TRIBUNAL:

                        The Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.

Qualification:

  The Chairperson of the Tribunal shall be a person, who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court.  A member of the Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Tribunal.  The Chairperson and members of the Tribunal shall be appointed by the Central Government from a panel of names recommended by the Selection Committee.

Tenure:

                        The Chairperson or a Member of the Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment.   No Chairperson or other member of the Tribunal shall hold office as such after he has attained-

in the case of the Chairperson, the age of sixty eight years;

in the case of any other member  the age of sixty five years

Disqualification:

                        Sec. 53K of the Act deals with the disqualification of the Chairperson and the members.  The Central Government may, in consultation with the Chief Justice of India, remove from office of the Chairperson or any other member of the Tribunal who-

a)      has been adjudged an insolvent; or

b)   has engaged at any time, during his term of office, in any paid employment; or

c)      has been convicted of an offence which, in the opinion of the Central Government involves moral turpitude; or

d)      has become physically or mentally incapable of acting as such Chairperson or other Member of the Tribunal; or

e)      has acquired such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or member of the Tribunal;

f)        has so abused his position to render his continuance in office  prejudicial to the public interest.

No Chairperson or a member shall be removed from his office on the ground specified in clause (e) or (f) except by an order made by the Central Government after an inquiry made in this behalf by a Judge of the Supreme Court in which such Chairperson or member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

### AWARDING COMPENSATION:

                        Sec.53 N deals with awarding compensation by Tribunal.   Claim for compensation, that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against finding of the Commission or under Sec. 42A (compensation in case of contravention of orders of Commission), or under Sec. 53Q(2) (compensation of in case of contravention of orders of Appellate Tribunal) may be made to the Appellate Tribunal.

### EXECUTION OF ORDERS OF TRIBUNAL:

                        Every order may be Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal to send in case of the inability to execute such order, to the court within the local limits of whose jurisdiction-

in the case of an order against a company, the registered office of the company is situated; or

in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business personally works for gain, is situated.

The Tribunal may transmit order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

### CONTRAVENTION OF ORDERS OF TRIBUNAL:

                        If any person contravenes without any reasonable ground, any order of the Tribunal, he shall be liable for a penalty of not exceeding Rs. 1 crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit.  The Chief Metropolitan Magistrate,Delhishall not take cognizance of any offence punishable save on a complaint made by an officer authorized by the Tribunal.  Any person may make an application to the Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Tribunal or delaying in carrying out such orders of the Tribunal.

### APPEAL TO SUPREME COURT:

                        The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Tribunal to them.  The Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period allow it to be filed after the expiry of the said period of sixty days.

### POWER TO PUNISH FOR CONTEMPT:

                        The Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and for this purpose the provisions of Contempt of Courts Act, 1971 shall have effect subject to modification that-

the reference therein to a High Court shall be considered as including a reference to the Tribunal;

the references to Advocate General in Section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.

## DIFFERENCE BETWEEN FERA AND FEMA

Foreign Exchange Management Act, 1999 (FEMA) emerged as a replacement or say an improvement over the old Foreign Exchange Regulation Act, 1973 (FERA). Foreign investors, frequently hear the terms FERA and FEMA, when they deal with India. As their name specifies, FERA lays emphasis on the regulation of currencies, whereas the FEMA manages foreign exchange, i.e. forex.

### About FERA

Foreign Exchange Regulation Act, shortly known as FERA, was introduced in the year 1973. The act came into force, to regulate foreign payments, securities, currency import and export and purchase of fixed assets by foreigners. The act was promulgated in India when the position of foreign reserves wasn’t satisfactory. It aimed at conserving foreign exchange and its optimum utilisation in the development of the economy.

The act applies to the whole country. Therefore, all the citizens of the country, inside or outside India are covered under this act. The act extends to branches and agencies of the Indian multinationals operating outside the country, which is owned or controlled by the person who is the resident of India.

### About FEMA

FEMA expands to Foreign Exchange Management Act, which was promulgated in the year 1999, to repeal and replace the earlier act. The act applies to the whole country and to all the branches and agencies of the body corporate operating outside India, whose owner or controller is an Indian resident and also any violation committed by the person covered under the Act, outside India.

The main objective of the act is to facilitate foreign trade and to encourage systematic development and maintenance of forex market in the country. There are total seven chapters contained in the act which are divided into 49 sections, out of which 12 sections deal with the operational part while the remaining 37 sections cover penalties, contravention, appeals, adjudication and so on.

### Key Differences Between FERA and FEMA

The primary differences between FERA and FEMA are explained in the following points:

FERA is an act which is enacted to regulate payments and foreign exchange in India, is FERA. FEMA an act initiated to facilitate external trade and payments and to promote orderly management of the forex market in the country.

FEMA came out as an extension of the earlier foreign exchange act FERA.

FERA is lengthier than FEMA, regarding sections.

FERA came into force when the foreign exchange reserve position in the country wasn’t good while at the time of introduction of FEMA, the forex reserve position was satisfactory.

The approach of FERA, towards forex transaction, is quite conservative and restrictive, but in the case of FEMA, the approach is flexible.

Violation of FERA is a non-compoundable offence in the eyes of law. In contrast violation of FEMA is a compoundable offence and the charges can be removed.

Citizenship of a person is the basis for determining residential status of a person in FERA, whereas in FEMA the person’s stay in India should not be less than six months.

Contravening the provision of FERA may result in imprisonment. Conversely, the punishment for violating the provisions of FEMA is a monetary penalty, which may turn into imprisonment if the fine is not paid on time.

Conclusion

The economic policy of liberalisation was first time introduced in India in the year 1991 that opened gates for foreign investment in many sectors. In the year 1997, the Tarapore Committee recommended changes in the present legislation that regulate foreign exchange in the country. After which FERA was replaced by FEMA in the country.

## RESTRAINT OF TRADE UNDER INDIAN CONTRACT ACT

Part XIII of the Constitution of India contains provisions relating to the freedom of trade, commerce and intercourse within the territory of India. The provisions are laid down in articles 301-307. Just as the Legislature cannot take away individual freedom of trade, wise versa the individual cannot barter it away by agreement.

“The Principle of law is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself, skill or talent, by any contract that he enters into.”  So plain meaning of Section 27 is every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.

In **Electrosteel Castings Ltd vs Saw Pipes Ltd**, (2005) 1 CHN 612, the words “lawful profession” in Section 27 include both an independent professional and salaried professional. Self-employment and all modes of economic survival or of earning one’s livelihood are covered.

Section 27 of Indian Contract Act, 1872 : Agreement in restraint of trade, void Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

**Exception 1** : Saving of agreement not to carry on business of which good will is sold – One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

**Madhub Chander vs. Raj** Coomar is the first case in which scope of the section came up for consideration before the Calcutta High Court. Here in this case restraint was only partial as he was restrained from exercising his profession only in one locality and that such restraints had been upheld in English law.

The Supreme Court of United States, in the leading decision in Standard Oil Company vs. United States (6) that as a ‘rule of reason’ that the term “restraint of trade” means that it meant at common law and in the law of the United States when the Sherman Act was passed and it covered only those acts or contracts or agreements or combinations which prejudice public interest by unduly restricting competition or unduly obstructing the due course of trade or which injuriously restrain trade either because of their inherent nature of effect or because of their evident purpose.

Section 27 of the Indian Contract Act, 1872 states that an agreement, which restrains anyone from carrying on a lawful profession, trade or business, is void to that extent. The main reason behind this section is that agreements of restraint are unfair, injustice as they impose an undue restriction on the personal freedom of a contracting party. However, as an exception, if a party sells his goodwill to another he can agree with the buyer that he will not carry on a similar business within the specified local limits.

### Restriction for long period

The doctrine of restraint of trade has been reconsidered by the House of Lords in **Esso Petroleum Co Ltd. vs. Harper’s Garage Ltd.** In this case, their Lordships struck down an exclusive dealing agreement because it extended to a period of 21 years, which was unreasonable. A five year period would have been held to be reasonable. They said that the doctrine applied only if a man contracted to give up some existing freedom which he had.

**Zaheer Khan vs. Percept D’mark India (P) Ltd, AIR 2004 Bom 362**, a contract restricting the party’s future freedom to carry on his affairs in a manner he likes and with persons of his choice, held, unreasonable restraint of trade.

**Coca Cola Company, (AIR 1995 SC 2372),** where the defendant and the plaintiff used to carry on the business of ferrying boats and arrived at a business settlement whereby the defendant promised to pay a certain amount to the plaintiff in order that the plaintiff abstain from carrying on his boat business for a period of three (3) years, the court held that the agreement was void as the restraining covenant was a vital part of the agreement and did not fall under the “goodwill exception” to section 27 of the Indian Contract Act, 1872.

In **Petrofina (Great Britain) Ltd. vs. Martin (5)**, Diplock L.J., a  contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses.”

In the same case, Lord Denning M.R. has expressed that: “Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interests.”

### Statutory Exceptions

1. Sale of Goodwill

The only exception mentioned in Section 27 of the Contract Act is related to sale of goodwill. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

Meaning of Goodwill :- There should be real goodwill to be sold. The Goodwill which has been the subject of sale is nothing more than the probability that the old customer will resort to old place.

2. Partnership Act

According to Section 11 the Partnership Act,1932 partners during the continuance of the firm to restrict none of them shall carry on any other business than that of the firm. Section 36 the Partnership Act,1932 is related to restrain an outgoing partner from carrying on a similar business within the specified period and specified local limits,

a. The agreement should specify the local limits or the period of restraint, and

b. The restriction imposed must be reasonable.

Firm Daulat Ram vs. Firm Dharm Chand, AIR 1934 Lah 110, where two ice factory owners constituting a partnership agreed that only one factory will be worked at a time and its profits distributed among them. The restraint was held to be justified.

3. Restraint upon employees

Restraint during Employment

Agreement of service contain negative covenants is for preventing the employee from working anywhere during period covered by the agreement. Now a days trade secrets is main contention for negative covenants. Employer’s wants to protect his trade secrets because of that employment agreement with negative covenants are generally used. Agreements for protection of confidentiality and trade secrets are not one sided or unfair or unreasonable. Any breach of such clauses on the part of employee can be treated as a misconduct.

Restraint during the employment and post-employment this issue was first time discussed by Supreme Court in  **Niranjan Shankar Golikar vs. Century Spg & Mfg Co. Ltd**. a  company manufacturing tyre cord yarn was offered collaboration by a foreign producer on the condition that the company shall maintain secrecy of all the technical information from its employees. The Defendant was appointed for a period of five years, the condition being that during this period he shall not serve anywhere else even if he left the service earlier. Shelat J held the agreement to be valid. The defendant was accordingly restrained from serving anywhere else during the currency of the agreement.

### Post-Employment Covenant

According to Indian laws any agreement which is related to restraint of trade and profession shall not be binding on the parties and the same shall be null and void. By using the term void ab initio, for such type of agreements it has shown that it has kept such non-compete clause in the agreements beyond consideration. Indian courts have also consistently refused to enforce post termination non-compete clauses in employment contracts as “restraint of trade” is impermissible under Section 27 of the Indian Contract Act 1872, and have held them as void and against the public policy because of their potential to deprive an individual of his or her fundamental right to earn a living.

Covenants that prohibit employees from engaging in a business similar to or competitive with that of the employer beyond the term of employment or post-employment are invalid.

A non-compete clause is well known under the Contractual Laws as the clause being made out into any agreement between two parties where one party is the employer and the other party is the employee. According to this non-compete clause, the employee undertakes and gives his acceptance as per the condition of the employer that during the course of the employment or even after post-employment, he will not be the competitor of the employer in the form and nature of the employment of the employer. The Non-compete clause finds place under the agreements and contracts throughout the world. According to Indian Contract Act, 1872 the non-compete clause, it is prohibited.

**Pepsi Foods Ltd. & ors. vs. Bharat Coca-cola Holdings Pvt. Ltd**. (19), post-employment restrictions were held to be invalid and violative of Article 19 (1)(g) of the Indian Constitution. Negative covenant in contract restraining employee from engaging or undertaking employment for twelve months after leaving the services of plaintiff was held to be contrary and in violation of Section of the Indian Contract Act, 1872 and injunction was    declined.

Conclusion

Article 21 of the Constitution of India guarantees the right to livelihood and this is fundamental right. Nobody can take away fundamental right because of this to enforce non-compete clauses in India even more difficult. But if we consider the global market and new upcoming conditions with new opportunities we need to adopt few legal changes. Therefore, the need to find equilibrium between rights of the employer and the employee.

It is believed that the factor of “reasonableness” would be the right covenant between employer and employee interests.

## COMPARISON BETWEEN MRTP ACT AND COMPETITION ACT

Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 was revoked and replaced by Competition Act, 2002. MRTP Act was enacted to deal with monopolistic, restrictive and unfair trade practices, but due to certain limitations, Competition Act was introduced, which changed the focus from curbing monopolies to promoting competition.

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| **S.No** | **MRTP Act, 1969** | **Competition Act, 2002** |
| 1. | 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. |
| 2 | It is based on the pre-liberalization and globalization era. | It is based on the post-reforms scenario. |
| 3 | The objective of the Act is to prevent concentration of economic power to common detriment to control of monopolies, prevention of monopolistic and restrictive trade practices. | The objective of the Act is prevent practices having adverse effect on competition and to promote as well as sustaining the competition to protect consumer interests at market place and ensuring freedom of trade. |
| 4 | Determined by firm's size. | Determined by firm's structure. |
| 5 | It lists out 14 offences, which are against the principle of natural justice. | It recognises only 4 offences, which are deemed to be against the principle of natural justice. |
| 6 | MRTP Commission has the power to pass only "Cease" and "Desist" orders. | The Competition Act can pass an order to prevent and punish such of those activities, which abuses competition. |
| 7 | No penalty for offense | Offenses are penalized |
| 8 | The MRTP Act did not provide for the formation of fund for its activities. | The Competition Act provides competition fund for promotion of competition advocacy and creation of awareness about competitive issues and training as may be prescribed in its rules. |
| 9 | Entity having status of dominant position is itself considered as bad. | Entity having status of dominant position is not considered as bad. Whereas abuse of dominant position affecting consumer interest is considered as immoral. |
| 10 | The chairman of MRTP Commission was appointed by Central Government. | The chairman of the commission will be appointed by a committee consisting of retired judiciary, person having professional expertise in various fields of trade commerce, industry, finance etc. |
| 11 | Focussed on consumer interest at large. | The chairman of the commission will be appointed by a committee consisting of retired judiciary, person having professional expertise in various fields of trade commerce, industry, finance etc. |