MEANING OF HORIZONTAL AGREEMENTS

Horizontal Agreement is an agreement for co-operation between two or more competing businesses operating at the same level in the market. This is generally to develop a healthy relationship between competitors. The substantial clauses of the agreement may include policies regarding pricing, production and distribution. The agreement may also discuss sharing of information regarding the products and the market. Horizontal Agreements can prompt violations of antitrust laws because these agreements may include clauses which restrict competition.

Horizontal Agreements may cause negative market effects with respect to prices and quality of products. On the other hand, horizontal cooperation can lead to substantial economic benefits such as sharing risk, cost savings, sharing know-how and making innovations faster. Price fixing is a term associated with horizontal agreements. It is an arrangement in which several competing businesses make a secret agreement to set prices for their products to prevent real competition. Price fixing is a criminal violation of federal antitrust statutes. Price fixing also includes secret setting of favourable prices between suppliers and favoured manufacturers or distributors to beat the competition.

Meaning of Horizontal Agreement under section 3(3) of the Act

Horizontal agreements relating to activities referred to under Section 3 (3) of the Act are presumed to have an appreciable adverse effect within India. Section 3(3) of the Act provides that agreements or a 'practice carried' on by enterprises or persons (including cartels) engaged in trade of identical or similar products are presumed to have appreciable adverse effect on competition in India if they:

- Directly or indirectly fix purchase or sale prices;
- Limit or control production, supply, markets, technical development, investments or provision of services;
- Result in sharing markets or sources of production or provision of services;
- Indulge in bid-rigging or collusive bidding.

These horizontal agreements are to have appreciable adverse effect on competition, which is similar to the *per se rule.* Cartel, being the most pernicious form of horizontal agreement, has been defined to include an association of producers, sellers, distributors, traders or service providers who, by an agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services. Cartels-form of horizontal agreement tend to curb competition and are one of the most difficult to detect anti-competitive agreements as generally they work in secrecy. The fixing of prices, bids, output, and markets allocation by cartels has no plausible efficiency justification. Prevailing national competition policies are oriented toward addressing harms done in domestic markets and in some cases merely prohibit cartels without taking strong enforcement behavior.

It is to be noted that under section 3(3) agreements, decisions and practices between similar trade of goods or provision of services is a condition precedent for prohibition. For the violation of Section 3(3) (b), it must be established that there exists

an agreement, practice carried on or, decision taken by entities mentioned therein, including cartels, engaged in identical or similar trade of goods or provisions of services, which result in effects mentioned in clauses (a) to (d) of sub-section (3) of Section 3 of the Act. These include acts that limit or control production, supply, markets, technical development, investment or provision of services. This proposition is observed by CCI in ***Shri Govind Agarwal Vs. ICICI Bank Ltd. (2/28), Shri Norbert Lobo Vs. Citibank (6/28), Shri Gulshan Kumar Gupta Vs. BHW Home Finance Ltd. (15/28)*****, decided on 07.06.2011 (MRTP Cases).**

Types of horizontal agreements

a) Agreements that directly or indirectly determine purchase or sale prices

Price fixing agreements, as the name suggests are agreements to fix, directly or indirectly purchase or sale prices. The term price fixing is applied to a wide range of actions taken by competitors having a direct effect on price and includes a number of agreements such as agreements on price, agreements on credit terms, agreements to adhere to published prices etc.

b) Limits or controls production, supply, markets, technical development, investment or provision of services

Agreements that limit or control production, supply, markets, technical development investment or provision of services are also considered to be anti-competitive. An example of such an agreement is one where there is a clause that the distributor must ensure the selling of 100 cylinders a month.

An agreement limiting production may lead to a rise in prices of the concerned product. Similarly, limiting technical development that may help in lowering the costs of a product may affect the interests of consumers. Livingstone notes that limiting production maintains high prices by ensuring that there is no surplus and therefore, demand remains steady; limitation of sales has a similar effect as well as discouraging competition for new entrants.

Agreement for limiting or controlling production are anticompetitive for two reasons; one that by controlling production. The supply is kept low as compared to the demand creating artificial scarcity; second the agreement, in effect restricts competition between the parties themselves so that the efficient ones among them also cannot go ahead with further production and dislodge the less efficient from the market.

c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or the number of customers in the market or any other similar way

This category covers the agreements referred to as market sharing agreements. Market sharing or market division agreements may be either to share markets geographically or in respect of consumers or particular categories of consumers or types of goods or services in any other way. An example of geographical market sharing would be an agreement between manufacturer "A" and a manufacturer "B" (both manufacturers of product "P") that "A" will sell product "P" in a certain geographic area, while "B" will sell product "P" in another area and A will not sell P in the area allotted to "B" and vice versa.

d) Directly or indirectly results in bid-rigging or collusive bidding

Rigging a bid occurs when by collusion among bidders, actual and potential, the members of that group keep the bid amount at a predetermined manipulated level. The substance of the explanation to section 3(3) is that "bid rigging" occurs when there is an agreement, between enterprises or persons, engaged in the supply of identical or similar products or services, which has the effect of eliminating or reducing competition for bids, or adversely affects or manipulates the process of bidding. The essence is that independence in the bidding process is taken away and the bid offered is the result of collusion. This would lead to the enterprise inviting bids having to deal with contracts that do not represent real costs and suffer economic loss.

Bidding and tendering are meant to buy goods at reasonable prices. Purchasers, who are often government entities, but who may also include private entities, seek to acquire goods and services by soliciting competing bids. Bid-rigging occurs, for example, when the competing suppliers conspire and agree in advance on the bids to be submitted by each, so as to control the outcome of the bid. By so doing the suppliers effectively raise prices, or keep prices high, and reduce or eliminate competition in the market place.

While the firms who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. In addition, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. Following statements and behavior may be suspicious:

- The proposals or bid forms submitted by different bidders contain irregularities such as identical calculations or spelling errors or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing bidders' bid.
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes.
- A company request a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract.
- A company brings multiple bids to a bid opening and submits its bid only after determining who else is bidding.

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, Bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. These conditions are neither the necessary nor sufficient condition for collusion.

The Act thus seeks to prevent economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It frowns

upon agreements among competing enterprises (horizontal agreements) on prices or other important aspects of their competitive interaction.