MEANING OF APPRECIABLE ADVERSE EFFECT ON COMPETITION (AAEC)

The basic requirement for section 3(1) of the Act to come into operation is that an agreement between enterprises relating to the supply of goods or services should cause or be likely to cause an AAEC within India. The key elements are: agreement, effect of the agreement on competition, that effect being adverse on competition and that adverse effect being appreciable.

Meaning of AAEC under the Act

The term appreciable adverse effect has not been defined in the Act, but Section 19(3) of the Act provides for certain factors to be given due regard by the commission while determining whether an agreement have AAEC or not, namely:

- Creation of barriers to new entrants in the market
- Driving existing competitors out of the market
- Foreclosure of competition by hindering entry into the market
- Accrual of benefits to consumers
- Improvements in production or distribution of goods or provision of services
- Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services

The first three factors, relates to negative effect on competition while the remaining three factors relates to beneficial effects. Thus, in assessing whether an agreements have appreciable adverse effect on competition, both the harmful and beneficial effects shall be taken into consideration while determining any case under Section 3 by the commission[1].

To ascertain the effect on competition of an agreement as being anti-competitive, the first step is to determine the market where the competition is complained of as having been adversely affected. The market that has to be taken into consideration for this purpose is called the 'relevant market'. The relevant market is to be divided into the relevant product market and the relevant geographic market relating to the product or service supplied. Once the boundaries of the market are determined in this manner, the effect of the agreement said to be anticompetitive is to be considered, that is, whether it has reduced existing competition or eliminated competition in the supply of the product or service in the relevant market. If the effect were adverse and appreciable, meaning thereby in a substantial part of that market, the agreement would be one prohibited by section 3 and, therefore, void.[2]

[1] Research article published on Manupatra authored by Vishesh Arora and Yashita Sharma on "Cartels and Competition: An Antithetical Relationship" available at: http://www.manupatra.co.in/newsline/articles/Upload/C88D1AFF-FE88-4E29-A37E-42A3F1F2109D.pdf.

[2] Book on **Competition law in India – Policy, Issues and Developments**, Third Edition 2014, Pg. 89 authored by T.Ramappa

The CCI examines the evidence at hand and determines if there exists a horizontal 'agreement' or a cartel. Once a cartel is found to exist, AAEC is presumed. Unless the presumption of AAEC is rebutted with the help of counter-evidence, orders prohibiting the cartel and/or imposing sanctions follow.

However, the presumption of AAEC does not attach to horizontal agreements if they are entered into by way of a joint venture which increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Given that section 3(3) seeks to prohibit cartels on the basis of a presumption that they cause an AAEC and it is onerous to rebut such a presumption, the 'standard of proof' required to establish the existence of a cartel agreement is a quintessential issue.

The issue of standard of proof is particularly important in cartel cases because once it is established that a cartel agreement exists, the presumption of an AAEC automatically applies. The burden then shifts to the defendants to adduce counter-evidence to try and establish that their agreement does not cause an AAEC. Once the CCI has considered the balance of probabilities to reach its decision on the existence of a cartel agreement, it's likely that a similar standard may be used to examine whether the counter-evidence submitted by the defendants is sufficient to rebut the presumption of AAEC[3]. While the CCI is yet to rule on this issue, the Supreme Court of India has consistently held that the rebuttal of a presumption requires refutation on the balance of probabilities **(*Vijay vs. Laxman& Anr*[4]).**

a) In ***FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum and others***[5], The Informant, FICCI-Multiplex Association of India had alleged that the Respondents namely United Producers/Distributors Forum **(UPDF)**, The Association of Motion Pictures and TV Programme Producers **(AMPTPP)** and the Film and Television Producers Gild of India Ltd. **(FTPGI)** were behaving like a cartel. The Informant alleged that UPDF is an association of film producers and distributors which includes both corporate houses and individuals independent film producers and distributors. The AMPTPP and FTPGI were the members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGI produce and distribute almost 100% of the Hindi Films produced/supplied/distributed in India and thereby exercise almost complete control over the Indian Film Industry.

   It had been further alleged that UPDF vide their notice dated 27.03.2009 had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the Informant. It had been further informed that being aggrieved by the decision of UPDF various members have approached the Informant and sought its assistance.

   The factors given in section 19(3) of the Act, for determination of AAEC, have been discussed in detail in the report of the Director General **("DG")**. As has been shown in the report, out of the six factors mentioned therein, the first

[3] Article by Samir R Gandhi, AZB & Partners on "India-Cartels" published by Global Competition Review – World Edition, available at "***http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2343/india-cartels/"***
[4](2013) 3 SCC 86
[5] CCI case no. 1 of 2009 decided on 25th May 2011

three relating to creation of entry barriers in the market for multiplexes have been indisputably violated. As regards the last three factors, there are no benefits to the consumer nor are there improvements in distribution of films or promotion of scientific, technical or economic development in the industry.

CCI observed that, "*the horizontal agreements specified in section 3(3) of the Act, the rule of presumption of AAEC contained therein shall apply. In fact, this rule of presumption shifts the onus on the Opposite Party to rebut the said presumption by adducing evidence and in that context the factors mentioned above may be considered by the CCI. Moreover, if a horizontal agreement is not covered by section 3(3) of the Act, even then the factors contained in section 19 (3) may be relevant and can be considered".*

In the present case, it had come in the reports of the DG that the members of the UPDF, AMPTPP and FTPGI who control almost 100% of the market for the production and distribution of Hindi Motion Pictures which are exhibited in Multiplexes in India were acting in concert to fix sales prices by fixing the revenue share ratio in violation of section 3(3)(a) of the Act. Besides, the DG has also returned a finding that the UPDF, AMPTPP and FTPGI and their members were also limiting/controlling supply by refusing to release Hindi Motion Pictures for exhibition in multiplexes in violation of section 3(3) (b) of the Act.

CCI was of the view that, "*once an agreement is covered within the presumptive rule contained in section 3(3) of the Act, a presumption as to AAEC has to be raised by the CCI and the factors mentioned in section 19 (3) of the Act need not be gone into by the CCI while drawing the aforesaid presumption with respect to the agreements mentioned in section 3(3) of the Act. In the instant case, the agreement entered into by the Opposite Parties is covered within the mischief of clauses (a) & (b) of section 3 (3) of the Act and, hence, it was incumbent upon the Opposite Parties to adduce evidence to rebut the aforesaid presumptions which they have miserably failed in the instant case. The presumption contained in section 3(3) of the Act is rebuttable and the Opposite Parties may produce evidence to controvert the presumption contained therein. No such effort had been done by the Opposite Parties in the instant case and no such evidence has been brought on record which may controvert the statutory presumption".*

CCI further observed that, "*the consumers were being adversely affected in this case. According to the DG report the multiplexes fall within the definition of "consumer" given in the Act. Clearly, they have suffered by the conduct of boycott by OP. Moreover, the DG report goes at great length to show how the end consumer or common viewer of movies has also been adversely affected in terms of rising ticket prices. The DG in his supplementary report examined the actual/ potential impact of the settlement of disputes on the point relating to revenue sharing ratio between the producers/distributors and multiplex owners on other stakeholders. It is noted therein that multiplex owners across the country have hiked ticket prices by 15-20 per cent depending on their location in September – October, 2009. This hike is reported to be the direct fallout of the enhanced revenue which multiplexes have to share now with the producers/ distributors".*

The DG in his reports has documented the effect of the new revenue sharing agreement between the producers/ distributors and the multiplex owners on the price of tickets. It is manifest that the prices of tickets have increased. The Opposite Parties have failed to rebut the evidence collected by the DG. Except making bald denials by the

Opposite Parties, no worthwhile document has been produced before the CCI to substantiate the plea. Accordingly, it is held that the agreement of June 9, 2009 has resulted into the increase of price of tickets and has worked to the detriment of the consumers.

The CCI after considering the contentions of the Opposite Parties on merit and after elaborate discussion ruled that Opposite Parties had contravened the provisions of Section 3(3)(a) and 3(3)(b) of the Act. Therefore the CCI imposed a penalty of Rs. 1,00,000/- on each of the 27 Opposite Parties.

b) In ***Ashtavinayak Cine Vision Ltd. vs. PVR Pictures Ltd. and others***[6]***,*** the informant involved in the case is a company incorporated under the Companies Act, 1956, involved in the business of production and distribution of the films. The PVR Pictures Ltd. **(OP-1)** happens to be a company engaged in the business of distribution and exhibition of feature films and Northern India Motion Pictures Association **(OP-2)** and other **Opposite Parties Nos. 3-17** are associations of distributors. The Eros International Ltd. **(OP-18)** is a company carrying on business of distribution of feature films. Explaining the practice prevalent in the film-industry, the Informant stated that getting a film registered through a distributor's association for the territory in which the distributor is carrying on business, is a pre requisite for theatrical booking by the distributor. All such associations make their bye-laws for the purpose of regulating the film-distribution business in the territory concerned. Film distributors are compelled by the associations to become their member on the pain of not being allowed to do business in the particular territory. Such compulsion is given effect to by the associations by threatening their members, i.e. distributors and exhibitors to not to exhibit the film which is not registered with the association or the distributor of which is not a member of the association. The Informant also stated that once these associations compels a distributor to become a member of the association, they subject him to unfair and undue restrictions like, the satellite rights of the film will not be granted for a certain period of time, home video rights will not be granted for a certain period of time, etc.

The Informant stated that OP-1 was appointed as a distributor of a film titled "*KhattaMeetha*", produced by the Informant itself. As a result of a dispute over some dues, the account between the Informant and the OP-1 was not settled. OP-1 made claim of certain amount of money as due, and when the Informant disputed the claim, OP-1 filed a complaint against the Informant with the OP-2. OP-2 issued a letter to the Informant informing it about the complaint. The Informant, in his reply, denied the claim of OP-1 and also challenged the jurisdiction of OP-2 on the matter. The Informant produced another film titled *"Rockstar"* for which OP-18 was appointed as the distributor. OP-18 was denied the registration of the film by OP-2, inter alia, on the ground that the association had received a complaint against the Informant. The Informant was apprehensive of the fact that OP-1 distributes films all over India and, being so, may have filed similar complaints with other associations as well, i.e. OP Nos. 3-17.

The CCI observed that, "*although the OP-2 averred that it banned the screening of the Informant's film to settle the dispute among the players in the industry, no conduct in the contravention of the provisions of the Act can be*

[6] CCI Case No. 71 of 2011 decided on 10th January 2013

allowed in the garb of acting as an arbitral forum for its members. The act of the OP-2 in issuing circulars to its members, prohibiting them from screening the film was an anti-competitive agreement".

The CCI observed that, "*once an agreement as mentioned in Section 3(3) is shown to exist, it is to be presumed that the agreement has had an AAEC, unless rebutted by the Opposite Party. As per the CCI, OP-2 in the instant case was not able to rebut the presumption stated above. Evaluating the instant case on the touchstone of the factors listed in Section 19(3) of the Act, the CCI decided that the act of the OP-2 does not, in any way, bring in any improvement in production or supply of films or any technological improvements".* Thus, the CCI concluded that the conduct of the Opposite Party association was anti-competitive, being in contravention of the provisions of sections 3(3)(b) read with section3(1) of the Act. The CCI, by way of an order, directed the OP-2 to cease and desist from any such activities in future.

Therefore it can be concluded that section 3 has not directly defined what an anti-competitive agreement is but has only provided that an agreement which causes or is likely to cause an appreciable effect on competition within India is prohibited and has declared that such agreement is void. Therefore, it is necessary to ascertain in each case whether an agreement does have that effect. Section 19(3) as discussed above specifies what factors are to be taken into consideration by the CCI in determining whether an agreement has an appreciable adverse effect on competition under section 3 or not.