FACULTY OF JURIDICAL SCIENCES

COURSE: B.A.LL.B. IX th Semester

SUBJECT: COMPETITION LAW

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LECTURE 8

TOPIC: SALIENT FEATURES OF THE COMPETITION ACT, 2002

Key Concepts and Significant features of Competition Act, 2002

For the detailed understanding of the Act it is important to get an insight of several important concepts and features of the Act. These are explained hereunder:

Key Concepts of the Act

The Competition Act, 2002 deals with mainly four concepts: (I)Anti-Competitive Agreements (II)Abuse of Dominant Position (III)Combinations and their regulation These are explained hereunder.

(I) Anti-Competitive Agreements Anti-Competitive agreements are those agreements among the persons involved in a business transaction which have the tendency to harm the Competition in a particular market or which results in undue benefit to one person or group over the loss of others. Such anti-competitive agreements are prohibited under the Competition Act, 2002. The term 'agreement' as defined under section 2(b) of the Act provides that the agreement does not necessarily have to be in the form of a formal document executed by the parties. It may or may not be in writing. Clearly, the definition so provided is inclusive in nature and not exhaustive and is a wide one. The main reason for adopting a wide connotation for the term 'agreement' in Competition law is because the persons so involved in anti-competitive activities may not enter into formal written agreements so as to keep it a secret affair. For example, Cartels are usually shrouded in secrecy. Section 3 of the Act prohibits any agreement with respect to production, supply, distribution storage, acquisition or control of goods or provision of services which causes or is likely to cause appreciable adverse effect on competition

within India.103Further section 3(2) provides that any agreement in contravention of this provision shall be void. On the basis of the provisions of Section 3 of the Act, anti-competitive agreements are divided into two categories namely horizontal agreements and vertical agreements.

(a)Horizontal Agreement: These are the agreements which generally occur between two or more entities or enterprises that stand at par with each other in terms of production, supply distribution etc.in the same market. For example, an agreement between manufactures of a particular commodity of not selling a particular product below agreed price or for not to supply a product to a particular market would be deemed as horizontal anti-competitive agreements. Competition Act, 2002 prohibits following types of horizontal agreements namely:(i)Agreements regarding fixing of purchase or selling prices of a product either directly or indirectly.104(ii)Agreements with regard to limit, control production, supply, investment, provision of services of particular products and for a particular quantity.105(iii)Agreement regarding sharing of market(iv)Bid Rigging Agreements. Explanation to Section 3(3)(d) defines 'bid rigging' as an agreement between parties engaged in identical business, which has the effect of eliminating or reducing the competition for bids or adversely affecting or manipulating the process for bidding. (v)Agreements in the form of Cartels. Cartels are created by anti-competitive horizontal agreements among business enterprises. They pose a great threat to competition and ultimately tend to destroy the free trade. In fact cartels are secret agreements between business firms with the sole objective of fixing prices or sharing markets between them

Vertical Agreements: According to Section 3(4) of the Act 'vertical agreements' are those agreements which take place among enterprises or persons at different stages or levels of production in respect of production, supply, distribution, storage, sale or price of goods etc. For example, any agreement between manufacturer and wholesaler which can adversely affect competition in the market will be termed as a vertical anti-competitive agreement. Competition Act, 2002 envisages various types of Vertical agreements. These are:(i)Tie-in-Arrangement: This arrangement includes any agreement that requires the purchaser of the goods to purchase some other goods

along with the required goods as a condition mandate.107Such kind of agreements is usually entered into by the sellers so as to increase their sales and earn more profit. A tie-in arrangement will become illegal when an enterprise uses its market power that it has on a particular product and by taking advantage does not sell or lease that product to the customer until and unless he agrees to buy another product that the enterprise wants him to buy.(ii)Exclusive Supply Agreement: Such agreements imposes restrictions on purchaser of the goods of not to acquire or deal in goods other than those of the seller or any other person. Such agreements are usually entered into by using dominant position in the market. For example, buyer of a particular commodity enters into an agreement with the manufacturer of not making the same product for any other buyer. However, such agreements should not be confused with arrangement between the buyers and sellers/ manufacturers with regard to specifications, quality, size etc. Which is legal and not anticompetitive in nature. (iii)Exclusive Distribution Agreement: Such agreement usually imposes conditions that limit, restrict or withhold the output or supply of any goods. Sometimes, restrictions with regard to allocation of any area or market for disposal or sale of goods are also covered under this part. Such arrange may violate the competition law if their effect substantially lessens or tends to create a monopoly in any line of commerce.(iv)Refusal to Deal: Agreements which, by any method, restrict, or are likely to restrict the persons or class of persons to whom goods are sold or from whom goods are bought are prohibited under the Act as such agreements have anti-competitive tendencies.(v)Resale Price Maintenance: Resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the 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. In other words, resale price maintenance refers to any attempt by an upstream supplier to control or maintain the minimum price at which the product is resold by its customer. This prevents the resellers from competing too fiercely and thereby drives down its profits. Insisting that a product be resold at a specific margin, or limiting the discounts that a reseller may offer, in essence restricts the reseller's ability to set a price and is accordingly prohibited. (c)Permitted Agreements: Competition Act, 2002 provides for certain exceptions which meant for the protection of Intellectual Property Rights (IPRs).

As per section 3(5) prohibition for anti-competitive agreements will not affect the right on any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the following legislations:(i)The Copyright Act, 1957,(ii)The Patents Act, 1970(iii)The Trade and Merchandise Marks Act, 1958(iv)The Geographical Indications of Goods (Registration and Protection) Act, 1999(v)The Designs Act, 2000(vi)The Semi-Conductor Integrated Circuits Layout-Design Act, 2000Similarly, exemption against anti-competitive agreements is also provided in cases of export. Section 3(5)(ii) lays down that prohibitions of anti-competitive agreements shall not apply to the right of any person to export goods from India to the extent to which the agreement relates export of goods or services.

(II) Abuse of Dominant Position.

A person or an enterprise is deemed to be in dominant position when such entity is in a position of strength and such position enables that entity to operate independently of competitive forces prevailing in the relevant market or affects its competitors or consumers or the relevant market in its favour. Dominant position has been defined in broadly similar terms in the competition laws of several other jurisdictions. The European Commission's Glossary states that 'a firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers, and ultimately, the final consumer.' For the purpose of Competition Act, 2002 the definition of 'dominant position' depends upon the definitions of relevant market, which are explained above. Thus, for an abuse of dominance finding, it is necessary to first find the enterprise in question occupied a position of dominance in terms of a particular product market and the demarcation of the geographic market for that product. Section 4 of the Act provides for control of such abuse. It states that no enterprise or group abuse its dominant position. It also provides for instances as to what acts amounts to abuse of Dominant position. The acts which amount to 'abuse of dominant position' are enshrined below (i)Direct or Indirect imposition of unfair or discriminatory condition in purchase or sale of goods or services or prices in purchase or sale (including predatory price) of goods and services. 'Predatory price' means selling of goods at a price which is below the cost of production of goods or provisions of service in order to eliminate

competitors or to reduce competition. The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 have been enacted for the determination of predatory pricing cost. According to Regulation 3(1), average variable cost will generally be taken as a proxy for marginal cost. (ii)Limiting or restricting the production of goods or services or putting restrictions on technical or scientific development relating to goods or services to the prejudice of consumers.(iii)Indulging in practices which result in denial of market access in any manner(iv)Using Dominant position in one relevant market to protect or to enter into another relevant market. One of the criticisms of Section 4 of the Act is that the offence of 'abuse of dominant position' does not depend on a finding of an appreciable adverse effect on competition (AAEC), as is required in case of anti-competitive agreements and combinations. The only place where AAEC is to be taken into consideration, when dealing with cases falling under Section 4, is contained in the factors that the Commission is required to take into consideration when determining whether an enterprise enjoys a dominant position under Section 19(4) of the Act. Section 19(4)(1) states that the Commission may take into consideration 'any relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition' while coming to a determination of whether an enterprise enjoys a dominant position.

(III) Regulations of Combinations

Regulation of the Combinations is the third area of focus of Competition Law. The Competition Act regulates mainly three types of combinations namely: (i)Acquisition of shares, voting rights or assets of another entity by a person or an enterprise. (ii)Acquiring control by a person over enterprise. (iii)Merger or amalgamation between or amongst enterprise. Section 5 of the Act defines combination by providing certain threshold limits below which combinations would not be covered under the scanner of Competition Act. The main justification behind prescribing such limits can be the reason that combination between small enterprises or entities may not have appreciable adverse effect on competition in Indian markets. The limits so provided under section 5 of the Act have been explained below:(a)In case of acquisition of share, voting rights or

acquiring the control: The person acquiring the shares and the enterprise whose shares, assets or voting rights are being acquired jointly have:(i)Assets in India: -More than 1000 crores Turnover: -More than 3000 crores (ii)Aggregate assets in India or Outside India: -More than 500 million dollars including at least 500 crores in India. Turnover: -More than 1500 million dollars includingatleast1500crores in India. In case of acquisition by group, the joint assets and such acquiring group should be:(i) Assets in India: -More than 4000 crores Turnover: -More than 12000 crores(ii)Aggregate assets in India and outside India: -more than 2 billion dollars, including atleast500 crores in India. Turnover:-More than 6 billion dollars, including at least1500 hundred crores in India.(b)In case of merger or amalgamation, the remaining enterprise after merger or the enterprise so created after amalgamation should have:(i)Assets in India: More than 1000 crores Turnover: -More than 3000 crores(ii)Aggregate assets outside India: 500 million dollars, including at least500 crores in India, or Turnover: -More than 1500 million dollars, including at least1500 hundred crores in India. If the enterprise so created after amalgamation or remained after merger belongs to a group, then such group should have:(i)Assets in India: -More than 4000 crores Turnover: -more than 12000 crores.(ii)Aggregate assets in India and outside India: -2 billion US dollars Turnover: -more than6 billion US dollars, including at least1500 crores in India. Further, Section 6 of the Act deals with the provisions of regulations of Combinations. It provides for a compulsory notice of details of proposed combination to the Commission along with prescribed fees within 30 days of execution of any document of acquisition or approval of the proposal of amalgamation or merger by the board of Directors. The time period prescribed for the combination to take effect is 210 days after giving of notice to the commission or the date on which any order has been passed by the commission with regard to that notice, whichever is earlier. However, exception has been provided in favour of public financial institution, foreign institutional investors, bank or venture capital fund in case of any covenant of loan agreement or an investment agreement.

Exercise:

1. Bid rigging has been defined as explanation to section ___________ of the Competition Act

a) 3
b) 2
c) 4
d) 5

2. Bid rigging means any agreement between enterprises or persons referred to in Section ____________ of Competition Act engaged in identical or similar production

a) 3 (3)
b) 3 (2)
c) 4 (3)
d) 4 (2)

3. Tie in arrangement includes any agreement requiring a _____________ of goods, as a condition of such purchase, to purchase some other goods

a) Purchaser
b) Seller
c) Broker
d) Producer

4. Section 3(1) of Competition Act, 2002 prohibits agreement which causes or likely to cause considerable adverse effect on ___________ with India

a) Competition
b) Trade
c) Business
d) Profession

5. Which of the following is Anti-Competitive Agreement?

a) Tie in arrangement
b) Exclusive supply agreement
c) Refusal to deal
d) All of these