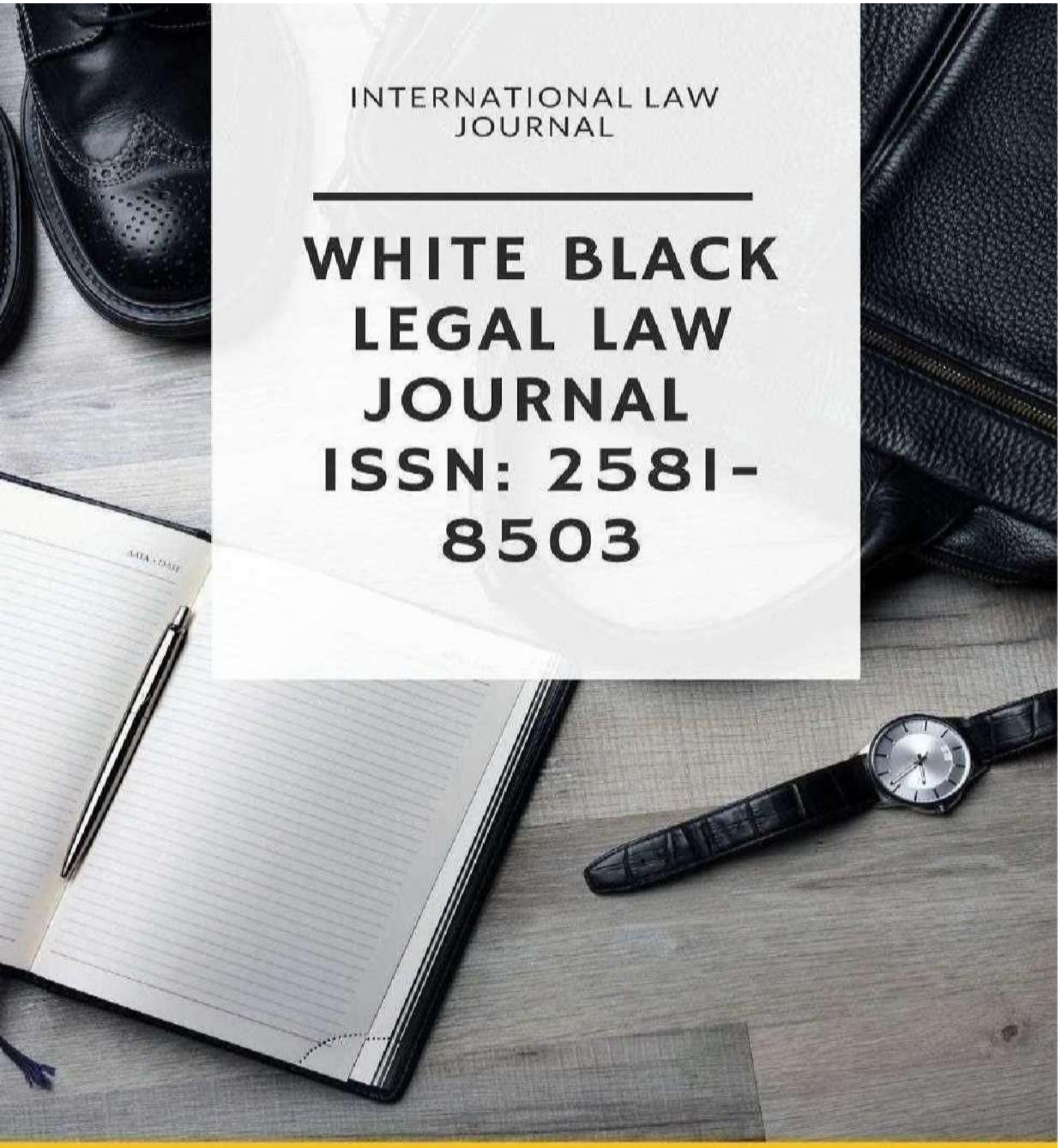

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in ‘Intercountry adoption laws from Uttranchal University, Dehradun’ and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

www.whiteblacklegal.co.in
Volume 3 Issue 1 | April 2025 ISSN: 2581-8503

CRITICAL ANAYLSIS OF ANTI- COMPETITIVE ACTIVITES IN INDIA UNDER COMPETITION ACT 2002

AUTHORED BY - ADITYA DADHICH
Assistant Professor, School of Legal Studies, Sangam University

ABSTRACT

The Competition Act 2002 was enacted to build India to face competition at wider level i.e. at both National and International level. Evolution of Jurisprudence of Competition Law in India gave rise to the issues related to the Interpretation of the Act. Major issue is the interpretation of the word 'agreement' under the Act. The rapid growth of the liberalization results into numerous problems related to anticompetitive practices should be avoided by the developing nations in their approach to competition. The main goal of the act is to discourage the anti-competitive activities in order to maintain the free and fair competition in the market. The research will be focus on the insights into the agreements which are anti- competitive in nature and analyze the broad interpretation.

Keywords: Competition, Agreements, Anti- Competitive

INTRODUCTION

The Constitution of India empowers its citizen to do trade and business under the ambit of the Fundamental Rights. Under this process of economic development the rivalry between the traders of the market to attract the customers or buyers is known as competition. In developing nations like India competition in the market is the vital source of growth. To governance this Indian Government introduces the Competition Act 2002. The main focus is to preserve the competition in the market and to ensure fair competition in order to maintain the freedom of trade and protect the interest of the consumers. The word Competition is not defined under the act. The Board sense of Competition is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share".[1] In other words it can also be defined as "a system in which markets are always open to potential new entrants and enterprises function

[1] World Bank, 1999: A Framework for the Design and Implementation of Competition Law and Policy.

under the pressure of competition"[2]

The Government of India enacted MRTP (Monopoly and Restrictive Trade Practice) Act 1969 on the recommendation of Das Gupta Committee report on how to manage the anti-competitive activities in market. However the primary goal of the act was to restrain the Monopoly rather than to promote the market competition. With the passage of time new technology and introduction of the globalisation and liberalisation with that effect the MRTP Act became outdated and there was need to shift the mindset from protect monopoly to encouraging competition.

Anti- Competitive Activities

Section 3 of the Act talks about the anti-competitive activities the prohibition of anti-competitive agreement under Section 3 of the Act. Section 3(1) of the Act provides that: "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."[3] On the general reading of this section it become evident that it only prohibits those act which have appreciable adverse effect on the competition. This section clearly mention that only those activities which have appreciable adverse effect will be prohibited and the burden of proof on the informer to prove the appreciable adverse effect of the particular activity in the market. Section 19(3) of the act state that Competition Commission of India (CCI) will determine whether an agreement have an adverse effect on the competition or not by following factors –

- Creation of barriers to new entries in the market
- Driving existing competitors out of the market
- Foreclosure of competition by hindering entry in the market[4]

Section 3(2) of the Act declares any agreement of such nature to be void. In *Haridas Export v/s All India Glasses Manufacture Association*[5] Supreme Court observed that the word adverse effect on competition includes contract, agreements and combination which operate to Prejudice the public interest by restraint the competition. It also observed that

[2] Pradeep S Mehta. A Functional Competition Policy for India , CUTS International, Academic Foundation , New Delhi , 2006 at p.26
[3] Section 3, Competition Act 2002.
[4] Section 19(3), Competition Act, 2002
[5] AIR 2002 Supreme Court 2728

Section 3(1) covers all the agreements which doesn't fall under section Section 3(3) and Section 3(4).[6]

There are generally two rules of interpretation which are applicable in the interoperating the laws related to anti-competitive agreements.

- Rule of Reason

  This Concept of anticompetitive agreements talks about that there should be proper reason behind the final judgment of the case. The origin of concept can be trace in the *U.S. Standard Oil Co. of New Jersey V. United States*[7] were court after proper investigation found that Standard Oil Co. of New Jersey guilty of monopolizing of the petroleum industry and violated that antitrust law of U.S. i.e Sherman Act 1860.

  In India it can be found under the TELCO case i.e *Tata Engineering & Locomotive Co. Ltd. V. The Registrar of RTP*[8] where court held that to determine whether the restrain promoted or suppressed competition in the market. Firstly the facts of the case should be considered, Secondly the condition of the market before and after the restraint and lastly what the actual and probable effect in the market is.

Rule of Reason	Per se Rule
Under this after the proper inquiry one can say that the acts have appreciable adverse effect on market or not.	In this it is presumed that the act will have a appreciable adverse effect on market
It is related to the Vertical Agreements	It is related to the Horizontal Agreements
Burden of Proof lies on the plaintiff	Burden of Proof lies on the defendant

HORIZONTAL AGREEMENTS

Horizontal agreements are those agreements which apply to the identical commodities of goods and services. It generally prohibits the agreement, practice and decision, as well the cartels.

It also concludes the agreements which are presumed to have applicable adverse effect on competition.

- Effects of Horizontal Agreements

[6] ibid
[7] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)
[8] 1977 AIR 973

- Determine the Price – Horizontal Agreements Affect the price of the product directly or indirectly. They can adopt the numerous methods such as increase or decrease the price.
- Limits and Control- Agreements that reduce or control the production of goods or their supply in the market will increase the price due to less supply.
- Share the Market- They adopt the market in a particular geographical area. This type of markets have negative effect on the consumer because by doing that they limit their choices.
- Bid Rigging- It take place when bidder keep the bid amount at a predetermined level by intentionally manipulating the member of bidding group.

The first kind of Agreement which have presumption of adverse effect is the determination of price. It occurs when enterprises try to enter into the agreement to fix the price of the particular thing and with effect of this it eliminates the competition which is based on the price. Price plays a vital role in the competition as with the passage of the time the price of the product change and when the competitors agree to fix the price it becomes anticompetitive itself despite of price being reasonable or unreasonable.

The next kind of horizontal agreement stats that the enterprises holds the production and supply in the market and also create hurdles for the technical development. When competitors agree to control the production then it leads to the high price of the particular product. This practice can be called as anti-competitive activities by two reasons firstly by controlling the production it will affect the demand and supply of the product which might create the artificial scarcity of the product. Secondly, parties restrict themselves by putting end at the competition and by doing so they loss there efficiency. In the *Builders Association of India v. Cement Manufactures' Association*[9] companies reduces the production even when there was demand in the relevant market as result of that the prices were increased. It was held that it was an agreement to limit the production thus it counts as anti-competitive.

The another agreement that falls under horizontal agreement Section 3(3)(c) is market sharing which have an presumption of appreciable adverse effect in the market. In this competitors agree to share the market area on the basis of geographical or product and they agree not to deal with the customers of each others. By doing so they eliminate the competition and

[9] 2012 CompLR 629 (CCI)

customer have no choices.

Next Agreement is Bid Rigging or Collusive Bidding. The essential of bid rigging is-

- Any agreement between the parties
- Parties engaged in the identical or similar kind of the product or services
- Agreement results into reducing competition or eliminate the competition in the market.

There are different forms of bid rig in the forms of agreement-

- Submit identical bid
- Submit the lowest bid
- Submission of cover bid
- Not to bid against each other
- Not allow outside to bid

Earlier there was confusion between the bid rigging and collusive bidding but in the case *Excel Crop Care Limited v. Competition Commission of India*[10] Supreme Court held that to understand the words bid rigging and collusive bidding we have to follow a principle i.e *noscitur a socus* which means when two or more words have susceptible meaning and words can take color from each other. Both the words have same meaning and they can be used interchangeable.

- ❖ Exception of Horizontal Agreements
- ➢ Horizontal Agreements doesn't apply to Joint Venture, if such venture increase the efficiency of production, supply, distribution and services.
- ➢ Export cartels are also free
- ➢ Section 3(5) restrains the infringement
- ➢ To protect the sovereign powers of government

VERTICAL AGREEMENT

When an agreement take place between the enterprise working on different level of production of goods and services such as agreement between manufacture and distributors. These types of agreement are not considered as per se like horizontal agreement. The concept of rule of reason is applied in the case of vertical agreement. Vertical agreement is considered illegal only if it results into appreciable adverse effect or unreasonable restrictions on the competition. On the basis of prima facie it will not considered illegal it must be establish after proper inquiry and

[10] AIR 2017 SC 2783

investigation that it generate appreciable adverse effect in the market.

Section 3(4) of the act states that "any agreement amongst enterprise or persons at various stages or levels of the production chain in different markets, in respects of production, supply, distributions, storage, sale or price, or trade in goods and services", Including –

- Tie – in arrangement;
- Exclusive supply agreement;
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance

Firstly Tie-in-arrangement; it means a seller is agree to sell a product or service only if the buyer agree the purchase the second item (tied item) from the seller.[11] In the international perspective tie-in arrangement is considers as illegal as in USA; The Sherman Act, The Clayton Act and Federal Commission Act all deals with the prohibition of the tying arrangements. In *Eastman Kodak Co. v. Image Technical Service Inc*.[12] U.S Supreme Court observed that in tie-in case following questions must be considered; First, whether two separate products were involved; Second whether the defendant had required to purchase the tied product with the tying product; Third whether a substantial amount of interstate trade is affected and last one whether the defendant has market power in the tying product.

Exclusive supply agreement; it also means exclusive dealing agreement which include any agreement which restrict the purchaser in the course of trade from acquiring or dealing in any goods other than those seller or any other person. For example, the buyer tells a manufacturer of product not to manufacture the identical goods for any other buyer without his consent. In Jindal Steel Power Limited vs. Steel Authority of India Limited (SAIL)[13] an MOU was entered by the Indian railways and steel authority for the supply of the railway equipment. It results into denial of the market access to the Jindal Steel by closing a relevant market. After analysis the market condition and situation of the railway the Apex court held that agreement does not fall under the section 3(4) of the competition act 2002.

[11] Kalinowski J. O. V on, World Law of Competition – United States (1) in Dugar S.M., Guide to Competition Law, P. 715, (LexisNexis 2012)
[12] 504,US 451, 461-462 (1992)
[13] COMPETITION COMMISSION OF INDIA Case No. 11 /2009

Exclusive distribution agreement it restrict the supply of goods in a particular jurisdiction. For example requiring a person no to sell the foods of the manufacturer beyond a certain territorial limit.

Refuse to deal it means any agreement which restrict someone to deal with certain goods and services The Competition Commission of India passed a landmark decision in the case of Shamsher Kataria v. Honda Siel Car India Ltd. & Ors.,[14] in this case 14 automobile organizations hold responsible of anti-competitive practice, to infringement of Section 3(4) and Section 4 of the Competition Act, 2002 and award them a huge penalty of INR 2544.65 Cores. The CCI for the first time examined and passed an order on vertical agreements and forced the biggest punishment.

Resale Price Maintenance it means any agreement to sale goods on the conditions. Conditions may be varies in the many form like a price is fixed to sold the product or maximum price is fixed above which product should not be sold.

Penalties

The CCI has shown through various cases that it will consider any aggravating or mitigating factors while determining the suitable level of fiscal penalty for violation of the Competition Act.[15]

In the event of a finding of an anti-competitive agreement, the CCI may:

- Direct the parties to discontinue, and not to re-enter into, the relevant agreement;
- Direct modification of the relevant agreement; and/or
- Impose a penalty not exceeding 10% of the average turnover for the preceding three financial years.[16]

CONCLUSION AND SUGGESTION

Today, it is evident from the evaluation of this research that the deal does make a variety of agreements. These configurations might not be completely horizontal or vertical. According to the researcher's experience, Section 3(1) has never been called upon on its own for a variety of

[14] Case No. 03 of 2011.
[15] Belaire Owner's Association v. DLF Limited and HUDA, [2011] 104 CLA 398 [Competition Commission of India].
[16] Section 27, Competition Act 2002

reasons, given the categorized black region. On the other hand, it could argue that there are no real grounds for not using it freely. In addition to being an explanatory clause, Section 3(1) is part of Section 3(2), which deems anticompetitive agreements null and void. The main prerequisite or group of restrictions on anti-competitive agreements is what may potentially make the Commission a Consumer Court.

There are numerous benefits to a more comprehensive understanding of Section 3(1) that can outweigh the drawbacks. Under the general framework of Section 3(1), agreements between industries that are not in the same chain of production can also be assessed, as can agreements between businesses and consumers. Hybrid agreements can also be studied. However, under Section 19(1) of the Act, the buyers or customer organizations also grant the CCI the ability to receive complaints regarding any anti-competitive acts that violate Sections 3(1) and 4(1).

The government should establish and enforce stricter penalties so that retailers and manufacturers think twice before engaging in dishonest business practices. In order to raise consumer awareness of the mechanisms for their increased participation and to seek justice in the event of a grievance, the government and other consumer agencies should endeavor to promote and publicize through the district forum, state, and national judiciary established for customer protection. The technique should be changed to make it more rational and understandable to a large number of clients. Additional processes must to be created to facilitate simple handling and speedy case transfers.