

ANTI-COMPETITIVE AGREEMENTS IN INDIA: AN ANALYSIS

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Abstract

In order to gain more consumer base in the market, businesses enter into anti-competitive agreements. Due to which the competition in the market is reduced and wealth is concentrated in a few hands only. There is a law called Competition Act, 2002 which helps to control anti-competitive practices. But it has some loopholes that still have to be dealt with. As depicted in “cement cartel case” companies formed a cartel to control the price of cement in the market. These kinds of practices have adverse impact on the competition in the market.

This paper will deal with the different types of anti-competitive agreements prohibited under competition law, impact anti-competitive practices on the Indian economy, role of Competition Commission of India in prohibiting the anticompetitive practices with the help of doctrinal research methodology.

Keywords: Competition Commission of India, Competition Act, Effect on Indian Economy, Interest of Consumer.

1. Introduction

Anyone who starts a business has the main aim of gaining profit by production of the product or services at low manufacturing cost. Along with it the businesses want to grow its customer base, so businesses try to enter into the new market which helps them to boost their sales, beat their competitors or build their reputation. In order to achieve more profit, many times businesses enter into anti-competitive practices which are prohibited under law. By entering into anti-competitive practices, they try to control the market forces or eliminate the competition from the market to gain more profit. Competition is important in the market since competitive businesses give their best to the consumers. They provide products with more innovative ideas, higher quality, and even lower prices.¹

¹Parvathy Giri, “Anti-Competitive Agreements Vis-a-Vis Mergers and Acquisitions – A Comparison Between India, US and EU” 2 *Journal of Multi-Disciplinary Legal Research* 7 (2021), available at: <https://jmdlr.in/static/media/Anti-Competitive%20Agreements%20Vis-A-Vis%20Mergers%20and%20Acquisitions%20->

The competition is a struggle between two or more parties to achieve a common goal which cannot be shared. As the competition among sellers in the market, to capture the market, increase sales or profit.²“According to Biesanz”, the competition means the struggle between two or more individual or groups for the same thing which is availability is limited and cannot be shared between parties.³“According to Sutherland, Woodward and Maxwell”, competition is a non-discriminatory, unintentional struggle between the parties or groups for fulfilment of need which is created due to limited supply.⁴

In order to maintain fair practices in the market, Competition laws are enacted. It is an instrument which helps to control the anti-competitive working in the market.⁵ In India for maintaining competition in the market government introduced the Competition Act, 2002.⁶ Under the Competition Act, a Commission is established that regulates the market, prevents anti-competitive practices, safeguard the interest of the consumer, and support healthy competition in the market.⁷

2. Objectives

- To study the types of Anti-Competitive Agreements
- To study the role of Competition Commission of India in prohibiting anti-competitive agreements in the market
- To study the exceptions available in case of Anti-Competitive agreements
- To study the Competition (Amendment) Act, 2023 in respect to anti-competitive agreements

3. Research Gap

To safeguard the interest of consumers and for the growth of market there is need to prohibit unfair practices there is need to enact the Competition law. Under Competition Law there is a

¹Comparison%20Between%20India,%20US%20and%20EU%20-%20Parvathy%20Giri.050ab3ed.pdf (Last Visited on April 1, 2023).

²Competition, *available at:* <https://www.tutor2u.net/economics/topics/competition#:~:text=Competition%20is%20rivalry%20among%20sellers,%2C%20product%2C%20distribution%20and%20promotion.> (Last Visited on April 1, 2023).

³Puja Mondal,“Competition: Definition, Characteristics, Types and Importance” *Your Article Library*,available *at:* <https://www.yourarticlelibrary.com/sociology/competition-definition-characteristics-types-and-importance/35120#:~:text=According%20to%20Sutherland%2C%20Woodward%20and,%2C%20all%20may%20not%20have%E2%80%9D.> (Last Visited on April 2, 2023).

⁴*Ibid*

⁵Jayanta Boruah, “Nature of Anti-Competitive Agreement Law in India: A Brief Review” *Brillopedia*(2021).*available at:* <https://ssrn.com/abstract=3916120> or <http://dx.doi.org/10.2139/ssrn.3916120>(Last Visited on April 1, 2023).

⁶ Abir Roy and Jayant Kumar, *Competition Law in India* 15 (Eastern Law House, Kolkata, 2nd Edn., 2014).

⁷*Supra* note 3 at 5.

prohibition on anti-competitive practices which involves forming “anti-competitive agreements” or “abuse of dominant position” and so on. But there are number of persons indulged in this activity. The Competition Commission is set up under competition act to take action in case of violation of provisions.

The main aim of the research is to study the provisions regarding “anti-competitive agreements” under competition law of India along with examples. What are the effects of the “anti-competitive agreements” on the Indian economy . The role played by CCI in controlling the “anti-competitive agreement” and maintain healthy competition in the market. The data regarding “anti-competitive agreements” cases registered or disposed of by CCI. Whether CCI has taken any initiative to ensure effective competition in the market.

4. Literature Review

- Vartika Gaur and Sanyam Juneja discussed in *Reprimanding ‘Anti-Competitive Agreements’ by the CCI*⁸, the arrangements which led to unhealthy competition between corporations or have negative impact on the market under competition law. The types of anti-competitive agreements. Under the act, the power of CCI to impose penalty.
- Amit Kashyap and Sonia Garg discussed in “*Critical Analysis of Anti-Competitive Agreements and Appreciable Adverse Effect on Competition in India*”⁹, that how globalisation create problems for developing countries. The competition law enacted by India tries to keep check on anti-competitive agreements. The objectives of competition law are to provide everyone equal opportunities in the market, growth of the market and safeguard the consumer interest. The different types of “Anti-Competitive agreements”.
- Boruah, Jayanta, discussed in “*Nature of Anti-competitive Agreement Law in India: A Brief Review*”¹⁰, the provisions of anti-competitive agreement under Competition Law. Does it have any effect on the competition in the market and what role played by the CCI.

⁸Vartika Gaur and Sanyam Juneja, “Reprimanding ‘Anti-Competitive Agreements’ by the CCI” 4 *International Journal of Law Management and Humanities* 281 (2021). available at: <https://www.ijlmh.com/paper/reprimanding-anti-competitive-agreements-by-the-cci/> (Last Visited on April 1, 2023).

⁹Amit Kashyap and Sonia Garg, “*Critical Analysis of Anti-Competitive Agreements and Appreciable Adverse Effect on Competition in India*” 7 *International Journal of Current Advanced Research* 9967 (2018). Available at: <http://journalijcar.org/issues/critical-analysis-anti-competitive-agreements-and-appreciable-adverse-effect-competition/>(Last Visited on April 1, 2023).

¹⁰ *Supra* note 2 at 5.

- Arya Sharma discussed in “*An Analysis of Anti-Competitive Agreements in India*”¹¹ about what is competition in general. The different anti-competitive agreements prohibited under competition law. What are the remedies against the anti-competitive agreements?

5. Utility of Research

Anti-Competitive Agreements hampers the competition in the market. The Competition Act prohibits anti-competitive agreements. There are number of cases regarding anti-competitive agreements coming into knowledge of CCI. In this study, we discuss the provisions regarding anti-competitive agreements in details. What are the exceptions for forming these kinds of agreements? The orders passed by CCI against enterprises for violating the provisions of the act. The findings of this study help to researchers, students or consumers to understand what are anti-competitive agreements and its different types. How CCI tackling this problem?. The findings of the study also provide information to Competition Commission of India during decided any case regarding anti-competitive agreements.

6. Anti-Competitive Agreements

Agreement came into picture when two or more parties agree to do something. Under Competition Act, the term agreement is defined. The scope of the definition is in board sense. The Competition Act, Section 2(b) defines the term agreement, which means any plan, action or provision in written form whether formal or informal and legally enforceable or not.¹²

The definition of Anti-Competitive agreements is given under the section 3 of the competition act; the provision is added to put restrictions on unfair practices. Anti-Competitive Agreements refers to those agreements which are undertaken by two or more companies participating in the market to reduce or fix the prices of goods or stocks. As they want to exploit the consumers and gain bigger market shares. The reduction in competition between companies will hamper the interest of the consumers. In respect of any goods or services if agreement has negative effect on the competition, then it is prohibited.¹³

Section 3 contains the points that are: According Section 3(1), deals with the negative impact on competition. It states that there is no agreement entered by enterprises with regard to goods

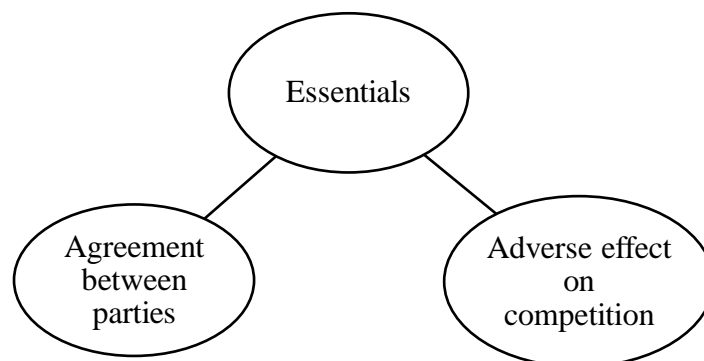
¹¹Arya Sharma, “An Analysis of Anti-Competitive Agreements in India” *International Journal of Advanced Legal Research*, available at: <https://ijalr.in/an-analysis-of-anti-competitive-agreements-in-india/#respond> (Last Visited on April 1, 2023).

¹²The Competition Act, 2002 s. 2(b).

¹³Dr. S. C., *Competition Law* 111 (Central Law Publications, Allahabad, 1st edn., 2012).

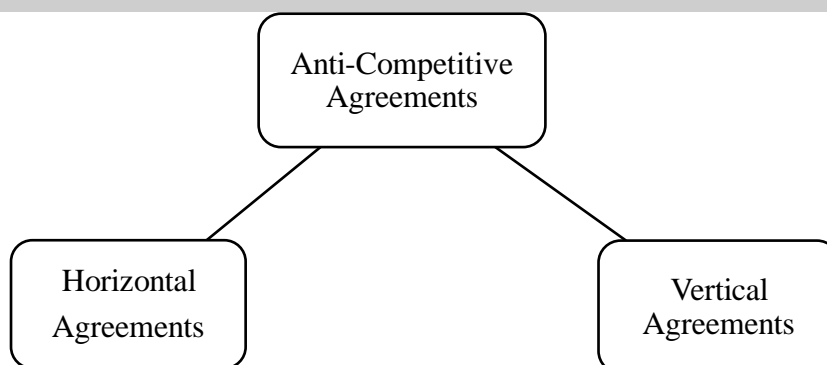
or services which have negative effect on the free market within India.¹⁴As per the Section 3(2) means if any agreement undertaken shall be void if opposing the provisions section 3.¹⁵

Essentials of Anti-Competitive Agreements



- There must be an agreement between parties in the market such businesses, individuals or association of businesses or individuals.¹⁴
- The agreement undertaken by the parties must affect the competition in the market.¹⁶

7. Types of Anti-Competitive Agreements



Horizontal Agreements

The Horizontal agreements are given under Section 3(3) of the Competition Law. The agreements which are undertaken by the individuals who are involved in same or identical business in respect of goods or services. The agreement can be between two or more enterprises or persons who are working at same level of production in the economy. The agreement can be

¹⁴The Competition Act, 2002 s. 3(1).

¹⁵The Competition Act, 2002 s. 3(2).

¹⁶*Supra* note 12 at 9.

entering between following parties, persons, enterprises, association of persons, association of enterprises or persons and enterprises. The Horizontal agreement includes the cartels. For Example, the services provided by Ola and Uber are same any agreement between them is horizontal agreement, due to nature of services they provided.¹⁷ There are various horizontal agreements that are Price Fixing,¹⁸ Output Limitation,¹⁹ Market Sharing,²⁰ Bid Rigging²¹ and Cartels²².

Vertical Agreements

The Vertical agreements are given under Section 3(4) of the Competition Law. These are agreements undertaken by two or more businesses or persons those are operating at different levels of manufacturing or distribution. The agreement between producers, wholesalers or retailers . For Example, ABC manufacturer of footwear have an agreement with retailer, that in order to promote the product in the market in return of low prices.²³ There are various vertical

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¹⁷Versha Vahini, *Indian competition Law* 72 (Lexis Nexis, Haryana, 1stEdn., 2016).

¹⁸Abir Roy and Jayant Kumar, *Competition Law in India* 59 (Eastern Law House, Kolkata, 2ndEdn. 2014). In this type of agreement, parties agree with each other to set the rate of goods or services means increase or lower the price rather than decided by the market forces. Example, in 2018, there are companies named Loblaws Companies Ltd., Walmart Canada Corp., Sobeys Inc., Metro Inc., and Giant Tiger Stores Ltd., decides to indulged in the activity to fix the price of the bread. It was decided to raise the bread price to \$1.5 by them

¹⁹*Id*, p63. The agreement given under Section 3(3)(b) which put limit on the manufacturing or supply of goods or services. In arrangement between parties decided to put restriction or control the manufacturing of goods or services by fixing level of production or quotas produce by the particular enterprise. It harms the enterprises by putting the restrictions their producing capacity. For Example, the agreements between parties put restriction to the use of highly productive machinery or there is restriction to use a particular method of production.

²⁰ The Competition Act ss. 3(3)(c). Section 3(3)(c) deals with the agreements that involves in share the area, customers or product among persons or enterprises. The sharing method can take place in different ways such as allocating a particular geographical area to a particular enterprise/person, allocating to produce a particular type of goods or services to particular person/enterprise or allocating the number of customers in the market to a particular enterprise/person and so on. These agreements affect the rights of the consumer as the have limited products or services. For Example, in an agreement ABC retailer is restricted to from selling the products outside North India.

²¹Dr. S. C., *Competition Law* 114 (Central Law Publications, Allahabad, 1stedn. 2012). Section 3(3)(d) deals with the big rigging. It means when parties participating in big rigging process are collude with each other in order to decide the winner of the bidding process. Which means parties decide not to compete with each in the bidding process. For Example, three school bus firms created a joint venture to offer transportation services to the schools under a contractual arrangement. The joint venture did not include any cost-saving operational integration. The FTC determined that the joint venture primarily aimed to prevent rival bids from being made by the bus firms.

²²T. Ramappa, *Competition Law in India* 104 (Oxford University Press, New Delhi, 3rd edn., 2014). The cartel came into picture when two or more enterprises enter into agreement regarding to put limit on production capacity, manufacturing process, distribution, fix prices, allocation of market shares, resources or customers or in collusive bidding or bid rigging. It was defined under section 2(c) of the Competition Act. For example, there are 14 oil producing countries formed Organisation of Petroleum Exporting Countries. This cartel formed worldwide with the objective to bring balanced in oil market in the countries.

²³Versha Vahini, *Indian competition Law* 103 (Lexis Nexis, Haryana, 1stEdn. 2016).

agreements such as Tie in Arrangement²⁴, Exclusive Supply Agreement, Exclusive Distribution Agreement,²⁵ Refusal to Deal²⁶ and Resale Price Maintenance²⁷.

8. Exceptions

There are exceptions available to anti-competitive agreements which are given under Section 3(5) of the Act. The agreements are prohibited which have negative effect on competitive environment of the market or not serve the consumers interest properly. There are some exceptions:

- Agreements related to Intellectual Property Rights
- Agreements regarding exports.
- Joint Ventures are also exempted²⁸

9. Effect of Anti-Competitive Agreement on Indian Economy

The anti-competitive agreements have negative effect on the Indian economy such as:

- The market forces will be control by the individuals or corporations who are at dominant position
- The price of goods and services are not decided by market forces as its cane be fixed by corporation has dominant position in their favour
- The individuals or business entered into an anti-competitive agreement, will tries to cast aside small business from the market in order to increase their customer base
- The wealth will be concentrated in few hands not properly distributed in the economy, due to which small business have lack of resources to survive in the market
- As there are few businesses able to survive in the market then there will be a lack of competition in the market, which means consumer will have limited variety of products and poor quality.
- Puts barriers on entry of new firms in the markets the small businesses not able to entry the market with limited resources

²⁴*Id*, p104. In this type of agreement, the person purchasing a good need to fulfil the condition of purchasing the other good. The seller is agreeing to sell the desired product to buyer, but there is condition that buyer need to buy less desired product irrespective of fact buyer wants to buy or not. For Example, A person wants to buy a refrigerator then he needs to buy stabilizer with it.

²⁵ *Id*, p114. In this agreement restrictions put to regarding limit of goods or services provided by the seller, particular area allocated for distribution of goods or services.

²⁶*Id*, p117. An agreement where restrictions are imposed regarding from whom goods can be bought or to whom can be sold.

²⁷*Id*, p119. The agreements in which goods were sold on conditions that the purchaser need to sell the goods at a rate fixed by the seller in the agreement.

²⁸ Abir Roy and Jayant Kumar, *Competition Law in India* 117 (Eastern Law House, Kolkata, 2ndEdn. 2014).

- Product will not be developed according to consumer requirement as the market dominated by the few players
- Effect imports, exports and trade relations with other nations due to high prices, poor quality, limited variety of the goods/services.²⁹

10. Competition Commission of India

In 2003, the market regulatory body was setup under competition law which is known as Competition Commission of India. It is a statutory body. All functions perform by the CCI is to regulate the market. The CCI is important organization of Indian economy as its functions contributing towards the development of the economy. The main objective of the CCI is to establish strong competitive environment in the market.³⁰ The objectives of CCI are: It safeguards the interest of the consumers³¹, it plays the role of watchdog with its help of it is possible to prohibits the anti-competitive practices which have negative effect on the growth of the market³², the fair and healthy competition must maintain by CCI in market for the growth of the economy³³ and for supporting air practices or healthy competition its CCI duty to provide freedom of trade to each and every individual or corporations.³⁴

Role of CCI in Prohibiting Anti-Competitive Agreements

- Further CCI has power to conduct inquiry in case agreements undertaken by enterprises. The power is given under section 19 of the competition law.³⁵
- According to the provision if any agreements undertaken which is contravening the section 3(1) of the competition law. Then CCI on its own its motion, receipt of complaint from any individual, consumer and corporation or by the reference made by government or authority can conduct inquiry.³⁶
- During inquiry commission need to find out whether agreement giving negative effect on competition by taking into account different conditions such as putting barriers on entry of new

²⁹Altamas Kabir, "Competition Laws and the Indian Economy" 23 *National Law School of India Review* 1-8 (2011). available at: <https://www.jstor.org/stable/44283735>

³⁰Versha Vahini, *Indian competition Law* 241 (Lexis Nexis, Haryana, 1stEdn., 2016).

³¹*Ibid*

³²*Ibid*

³³*Ibid*

³⁴*Ibid*

³⁵The Competition Act, 2002 s. 19(1).

³⁶*Ibid*

participant in the market, throwing out existing enterprise of the market, increase in advantage to customers, development in means of manufacturing or service providing.³⁷

- After conducting inquiry if commission found there is violation of provisions, then can give directions to director general to conduct investigation and if nothing is found during inquiry the matter can be closed by CCI.³⁸
- The director general needs to submit report on finding after investigation and then CCI send report to the parties.³⁹
- In case director general report states there is no violation then CCI asks parties for suggestions or objections.⁴⁰
- If after hearing complainant or accepting the director general recommendations CCI thinks there is no violation then dismissed the complaint.⁴¹
- In case there is violation of the provisions of the law then CCI further directs for inquiry to be conducted as per the conditions mentioned under the act.⁴²
- After inquiry CCI has power to pass the order which states as follow:
 - a. Enter into new agreement
 - b. Terminate the agreement
 - c. Impose penalty not exceeds 10% of turnover of last three financial years
 - d. Modified the order to extent violating the provision⁴³

The orders passed by CCI in order maintain competition in the market

• **Solar Life Sciences Medicare Private Limited v. Chemist Association, Raisingh Nagar and Others**,⁴⁴ in 2020 information filed by Solar Life Science Medicare Pvt. Ltd (informant) under Section 19(1)(a) stated that chemist association which contains 60 chemists that they together boycotting the certain pharmaceuticals products of manufacturing including informant. The important points that they are deciding the margins and incentives scheme for manufactures or suppliers. And whosoever not following them they are boycotting that manufacturer or suppliers' products. CCI ordered that association of chemist are violating the

³⁷The Competition Act, 2002 s. 19(3).

³⁸The Competition Act, 2002 s. 26(1).

³⁹The Competition Act, 2002 s. 26(2).

⁴⁰The Competition Act, 2002 s. 26(4).

⁴¹The Competition Act, 2002 s. 26(6).

⁴²The Competition Act, 2002 s. 26(7).

⁴³The Competition Act, 2002 s. 27.

⁴⁴*Solar Life Sciences Medicare Private Limited v. Chemist Association, Raisingh Nagar and Others*, Case No. 20 of 2020, decided on August 23, 2023.

section 3(3)(a) and 3(3)(b) and held the president of the association liable under Section 48 of the Competition of Act.

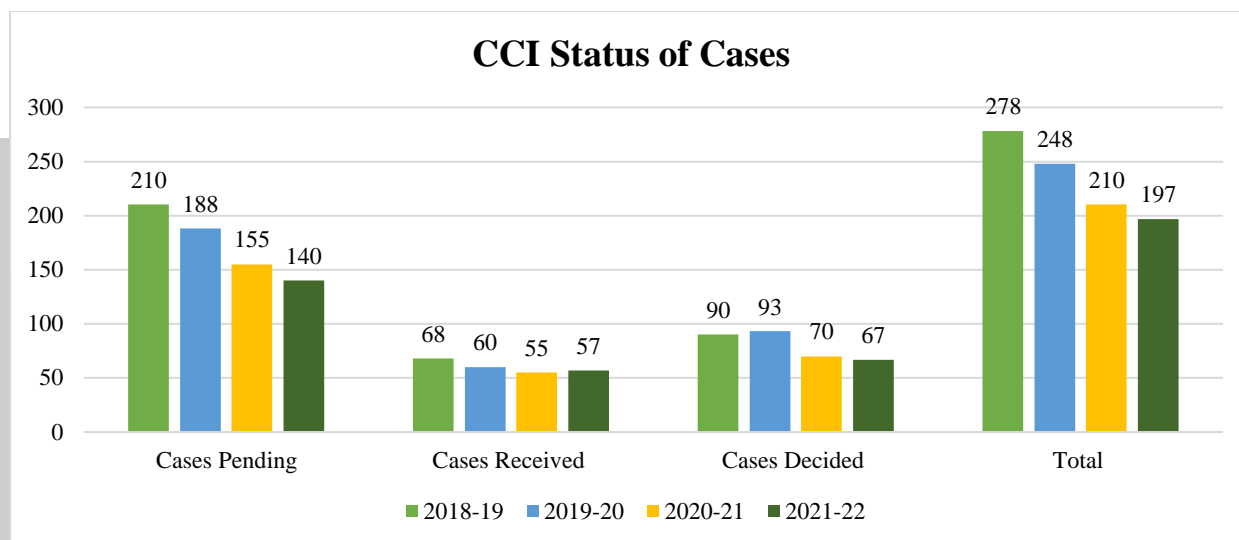
• **Builders Association of India v. Cement Manufacturers Association and Other**,⁴⁵ in 2017, report was given to CCI by India's Builders Association against Cement Manufacturers' Association and eleven cement corporations. The platform was decided by the Cement Manufactures Association where parties communicate with each other and rate of cement fixed by them and put limit on the supply of the cement, in order to control the market. CCI ordered the Rs. 6,000 crores penalty against eleven leading cement companies after finding that they have form cartels which result in control the production, supply or cost of the cement in the market. The companies are violating the provisions of the Companies Act.

• **Shri Shamsher Kataria v. Honda Siel Car India Ltd. & Others**,⁴⁶ in this case complaint was filed against Honda, Volkswagen, and Fiat that these companies indulged into anti-competitive practices as controlling the working of the service centres or workshops those are dealing in spare parts. They are abusing the dominant position. The restriction was put by the companies to make available of original spare parts, software programs, and technical information in the market without which working of automobile is impossible. From Original Equipment Manufacturer, only authorized dealers allowed buying and restrictions put to sell in the open market. The high prices were charged by the Original Equipment Manufacturers and authorized dealers. CCI order that Original Equipment Manufacturers OEM abusing the dominant position as putting restrictions on local dealer to enter the market. The penalty was imposed of %2 of the turnover on the Original Equipment Manufacturers.

Report of CCI on Status of Cases

⁴⁵*Builders Association of India vs Cement Manufacturers Association & Ors.*, Case No. 29 of 2010, decided on June 20, 2012.

⁴⁶*Shri Shamsher Kataria v. Honda Siel Car India Ltd. & Ors.*, Case No. 03/2011, decide on August 25, 2014.



Till now CCI has decided more than 1200 cases regarding anti-competition practices. From the above shown bar graph it is clear that total cases received by CCI under section 3 & 4 of the Competition Law from 2018 to 2022 is 1180. From the total cases, CCI decided 1046 cases and remaining cases were withdrawn or set aside by CCI which means 88.64% of the cases decided by CCI.

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11. Recent Amendment in Competition Law

On 11th April, 2023 the competition (Amendment) Bill, 2023 received the assent of the president and became the Competition (Amendment) Act, 2023 which brings number changes to the earlier competition law. The amendment brings changes regarding anti-competitive agreement extent, time limit for evaluation of the combination and penalties. The anti-competitive agreement under new act started covering⁴⁷:

- **“Hub and Spoke Cartels:”** The business/entities who are not working in same or identical field will be treated under section 3(3), the part of anti-competitive agreement if act or plan to act in furtherance of agreement. If parties are not part of the agreement but enable the anti-competitive horizontal agreement are covered under this.⁴⁸
- **Sellers:** The term “exclusive supply agreement” is removed and added “exclusive dealing agreement”.⁴⁹

⁴⁷Sarvesh Mathi, “Key Features: Indian Parliament Passes Competition (Amendment) Bill, 2023” *Medianama* April 4, 2023. available at: <https://www.medianama.com/2023/04/223-key-features-competition-amendment-bill-2023/> (Last Visited on April 11, 2023).

⁴⁸*Ibid*

⁴⁹*Ibid*

- **Sale of Goods and Services:** The different types of agreements such as tie in “tie-in arrangement,” “refusal to deal,” “resale price maintenance” and “exclusive distribution agreement” not cover goods only but goods and services.⁵⁰
- **Indirect Restrictions:** The “resale price maintenance agreement” will cover both direct and indirect restrictions.⁵¹
- **Alteration to AAEC circumstances:** Under the bill factors are altered on which basis CCI decides whether agreement has negative effect on the market or not. That are “foreclosure of competition by hindering entry into the market” to “foreclosure of competition”, “accrual of benefits” to “accrual of benefits or harm”.⁵²

12. Conclusion & Suggestions

Competition within the market serves as a natural filter, ensuring that subpar goods or services cannot sustain themselves for an extended period. Competitive market condition is highly advantageous and profitable for consumers, as it guarantees access to top-quality products at reasonable prices. To promote economic growth and development, it is imperative to prioritize consumer awareness and protection. The Competition Act goes beyond merely prohibiting anti-competitive agreements that harm buyers; it also addresses agreements that disrupt competition within the market. Indian competition law explicitly forbids such anti-competitive agreements. Any corporation or individual found engaging in such practices can be held accountable for unfair practices under the purview of the "Competition Commission of India." Some recommendations may be incorporated for the protection of the interest of the consumers, including transfer of more powers to the CCI, stricter rules for violators of the law whether they are manufacturers or retailers, proactive steps by government and consumer agencies to raise consumer awareness, adopting simplified procedure for resolving disputes and addressing competition-related issues, establishing specialized agencies at the state or district level across all sectors equipped with the expertise

⁵⁰*Ibid*

⁵¹*Ibid*

⁵²*Ibid*

required to address competition-related matters effectively. By implementing measures, there are possibility to strengthen its consumer protection framework, promote fair competition, and contribute to the overall well-being of its economy and citizens.



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