

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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DECODING ANTI-TRUST PARADIGMS: DRAWING A COMPARISON BETWEEN THE RULE OF REASON AND THE PER SE RULE

AUTHORED BY: PRAVISHA VERMA

ABSTRACT

Competition law across the globe carries the underlying purpose of fostering innovation, ensuring protection of consumers and advocating for a healthy competition amongst enterprises, and in doing so it seeks to implement fair play in the market, keep monopolies in check and curb anti-competitive practices. Thus, determining the nature of an agreement/practice as anti-competitive forms a major component of the work carried out by competition agencies across the globe. Either the per se rule or the rule of reason is adopted by such agencies to examine anti-competitive agreements. Majority of the countries make a distinction between the two because there of a consensus being present with respect to the pernicious effect of hardcore activities like cartelisation and their subsequent illegality. However, Indian law has made no sharp distinctions between the two and the liability is predicated on a noticeable harmful effect on competition within India. Through this paper, the author aims to analyse the Indian position with respect to these rules, while delving into the legal framework present, comparing it with the norms of other jurisdictions, deciphering contemporary issues pertaining to the same and providing probable solutions for the same.

Keywords: Rule of Reason, Indian Competition Law, Per Se Rule, Anti-competitive practices.

Introduction

For the presence of efficient and dynamic markets, it is crucial that a balance between advancing fair competition and curbing anti-competitive activities is maintained. Two cornerstone legal principles- “**Rule of Reason**” and the “**Per Se Rule**” play a pivotal role in evaluating the liability of numerous business practices. These rules present contrasting methodologies adopted by courts in determining whether specific conduct like market division, price fixing or signing of exclusive agreements, is detrimental to competition.

Per Se Rule

This rule, as the prefix *per se* intimates, stipulates that certain trade practices are to be considered illegal because their fundamental characteristics so severely limit competition that the courts or the commission will not (because there is no need to) conduct a thorough economic investigation into the motivations behind the practices' adoption of their tendencies, or effects or the circumstances which led to their adoption and use.¹

The rule has its roots in the United States where it was established via an interpretation of **S.1 of Sherman Antitrust Act, 1980**² with its basis well explained in the case of *Northern Pacific Railway Co. v United States and Ors*³. Even though it appears that the phrase '**per se**' was not in use until 1940⁴ the basic rule can be tracked back to 1896⁵. However, the Supreme Court lacked consistency in the application of the rule, which has increased significantly since 1940 along with the application of the rule being expanded to cover various types of restraints.⁶

Rule of Reason

Rule of reason is a broader concept which encompasses the needs of the changing economy . As per this approach, a practice will only fall within the mischief of law, post a thorough investigation of the entailed economic consequences reveals its nature as anti-competitive.⁷ Under this rule "*the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition*"⁸

Through the course of common law it was established that agreements, ancillary to the sale or business or transfer of trade and those limited in such a manner so as to put forth a restriction which was reasonable were legal⁹. Despite this when the Supreme Court was faced with the question first, it held that no justification of reasonableness could be used as a defense to a

¹ Vyas, Yash, *The Monopolies and Restrictive Trade Practices Act and the Rule of Reason: A Comment on the Supreme Court Approach* , 34, J .Indian Law Inst, 365, 365-366 (1992)

² Sherman Antitrust Act, 15 U.S.C. § 1 (1890)

³ Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958)

⁴ United States v Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

⁵ United States v Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897)

⁶ Macdonald Flinn et al. *The Per Se Rule*, 38, Antitrust Law J, 731, 732 (1969)

⁷ Vyas, *supra* note 1"

⁸ Continental T.V. Inc v GTE Sylvania Inc., 433 U.S. 36 at 49 (1977)

⁹ Packet Co. v Bay, 200 U.S. 179 (1906) "

combination causing the effect of restraining trade.¹⁰ It was in the *Standard Oil Case*¹¹ that the Court explicitly stated that only acts which were unreasonably restrictive of competition were prohibited by Sherman Act and that standard of reasonableness had been applied to all restraints of trade at the common law.¹²

Indian position with respect to the rules

In India, anti-competitive agreements are governed **Section 3¹³ of the Competition Act, 2002**. Any agreement in relation to “*supply, production, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause, **appreciable adverse effects on competition within India (here onwards “AAEC”)** is prohibited by the act.*”¹⁴ Such an agreement is to be considered void. An aspect of the per-se rule can be found in the Indian legislation in form of **Section 3(3) of the Act¹⁵**, which provides a stricter treatment to certain kind of horizontal agreements¹⁶ by “*presuming them to have adverse effects on competition.*”¹⁷ With respect to **vertical agreements¹⁸**, **Section 3(4)¹⁹** is present. The section lists down five types of agreements which are to be considered in violation of Section 3(1) of the Act if they “*cause or are likely to cause appreciable adverse effect on competition in India.*” The agreements listed are tying agreements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance agreements.

The above position explains that in majority of the cases the standard resorted to is of “**appreciable adverse effect on competition**” the term, however, is not defined²⁰ in the act.²¹ However, the commission is required to consider pro-competitive effects of an agreement along with the anti-competitive ones while determining its nature. Such a balanced approach draws similarity to the “rule of reason.”

¹⁰ United States v Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897)

¹¹ Standard Oil Co. v United States, 221 U.S. 1 (1911)

¹² Lee Loevinger, *The Rule of Reason in Antitrust Law*, 19, Sect. Antitrust Law, 245, 245-246 (1961)

¹³ The Competition Act, 2002, § 3, No. 12, Acts of Parliament, 2003 (India)

¹⁴ Tilottama Raychaudhuri, *Vertical Restraints in Competition Law: The Need to Strike the Right Balance between Regulation and Competition*, 4 NUJS L. REV. 609 (October-December 2011)

¹⁵ The Competition Act, 2002, § 3(3), No. 12, Acts of Parliament, 2003 (India)

¹⁶ Horizontal agreements are agreements between enterprises that operate at the same level of supply chain and compete in the same market.

¹⁷ Esha Alex, *Criminal Prosecution in Anti-Trust Enforcement*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023)

¹⁸ Vertical agreements- agreements between enterprises at different levels in a supply chain, like a manufacturer and retailer.

¹⁹ The Competition Act, 2002, § 3(4), No. 12, Acts of Parliament, 2003 (India)

²⁰ The Act specifies the factors which should be taken into consideration while determining whether a particular agreement causes appreciable adverse effect on competition or not.

²¹ “Aditya Gupta, *Kimble v. Marvel: A Misconceived Affirmation*, 9 CHRIST U. L.J. 1 (2020)

Deciphering the difference in implementation: India vs U.S.

Section 3(3)²² gives the appearance of mirroring the per-se rule however, the two are not the same. The words “*shall presume*” are used in the section which implies a refutable presumption²³ in favour of appreciable adverse effect on competition. The defendant carries the burden of proof to demonstrate that the agreement doesn’t lead to AAEC in adherence to provisions of S. 19(3)²⁴. The case of **FICCI Multiplex Association of India v United Producers/Distributors Forum (UPRF)**²⁵ expressed the same point with the commission holding that the presumption could be refuted by the parties presenting evidence against it. In contrast in the U.S., categorised conduct is presumed illegal, leaving no room for justifications or rebuttals. Thus, if viewed through the lens of simplicity, no actual per-se rule is present in India.

In the case of *Neeraj Malhotra v Deutsche Bank Home Fund Limited and Ors*²⁶, it was held by the court that despite the per-se rule being incorporated in the Indian legislation under S. 3(3), it is losing its essence with S. 19(3) being utilised to elucidate the same as it forms an indirect exemption to the rule laid down in the section.

Problems with generalisation vis-à-vis emphasis on vertical agreements

There is a lack of distinct rules for governing any particular kind of vertical agreements, with the test of adverse effects under S.19(3) being the standard. This proves to be problematic because all vertical agreements cannot be examined using the same standard. U.S. precedents are witnessing of the fact that in certain cases like resale price maintenance, **establishing benefits can be more difficult than proving the harmful consequences**²⁷. A blind replication of the rule of reason approach will also bring about the problem currently faced by the U.S. Courts of coherent application of rule of reason to different kind of agreements.²⁸ Second, the **Act and the EC statute are comparable** in that they specify the factors that must be

²² “The Competition Act, 2002, § 3(4), No. 12, Acts of Parliament, 2003 (India)

²³ Ravish Ranjan, *Horizontal Anti-Competitive Agreement: A Critique*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022-2023)

²⁴ The Competition Act, 2002, § 19(3), No. 12, Acts of Parliament, 2003 (India)

²⁵ Federation of Indian Chambers of Commerce & Industry Multiplex Association of India v United Producers, (2011) CompLR79

²⁶ Neeraj Malhotra v Deutsche Bank Home Fund Limited and Ors, (2011) 106 SCL 62 (CCI)

²⁷ Thomas A. Lambert, *Dr. Miles is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 Wm. & Mary L. Rev. 1937 (2009)

²⁸ Aditya Bhattacharjea, India's New Competition Act: A Comparative Assessment, 4 J. COMPETITION L. & Econ. 609”

considered when evaluating potential negative consequences.

However, this **adverse effects test only partially complies with EC Art. 81(3)**. Vertical agreements must meet specific requirements set forth by the European Community (EC) rules in order to be exempted.²⁹ These requirements include allowing consumers to share in the benefits of the agreement, avoiding excessive restrictions that might hinder the achievement of the efficiency target, and not significantly reducing competition³⁰. **While the Act's requirements are only optional, all of these are required."** This poses a risk and may lead to significant issues down the road when the Competition Commission is faced with these kinds of situations.

A case for selective implementation of the Per Se rule in India

In view of the current complex and dynamic economy, a context-driven, flexible approach to examine potentially anti-competitive practices, offered by the rule of reason is better suited. However, with respect to certain activities such as price-fixing, cartels etc., the author believes that the stricter Per-Se rule should be implemented in India. India can effectively dissuade businesses from participating in these anti-competitive practices by classifying such activity as automatically unlawful and eliminating the need for a thorough examination of their effects on the market.

Enforcing the Per Se Rule strictly will simplify enforcement since it would enable the Competition Commission of India (CCI) to penalize clear infractions quickly, saving money that would otherwise be used for drawn-out investigations. Furthermore, taking a tougher position against these activities harmonizes India's regulatory framework with that of leading antitrust jurisdictions worldwide, such as the United States and the European Union, encouraging increased investor confidence and equitable market competition.

²⁹ Sandra Maro Colio, Vertical Agreements and Competition Law- A comparative study of the EU and US regimes, 93 (2010)

³⁰ Derek Ridyard & Simon Bishop, E.C., Vertical Restraints Guidelines: Effects Based Or Per Se Policv, 23(1) ECLR 35-38 (2002)

Conclusion

To conclude, the Per-Se rule and Rule of Reason both offer contrasting approaches to determining the anti-competitive nature of agreements, and while India's competition law majorly makes an application of the Rule of Reason to anti-competitive behaviours, the author believes that adoption of Per Se rule for clear violations like cartels, price-fixing and bid-rigging can help strengthen the enforcement mechanism while also proving to be cost-efficient. A hybrid approach would mix flexibility with stronger deterrence, bringing India's competition legislation in line with international best practices. India would adopt the Per Se Rule for the most destructive conduct while keeping the Rule of Reason for more complex instances.

