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Anti-Competitive Agreements: Understanding Cartels and Bid-Rigging

Khushi Malviya · 06 Jun 2026

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Introduction

Competition law, also known as antitrust law in some jurisdictions, is designed to promote and maintain market competition by regulating anti-competitive conduct by companies.

A core focus of competition law is the prohibition of anti-competitive agreements, which are arrangements between enterprises that have the object or effect of preventing, restricting, or distorting competition in a market.

These agreements can take various forms, ranging from formal written contracts to informal understandings or concerted practices. The primary concern with such agreements is that they can lead to higher prices, reduced quality, limited innovation, and less choice for consumers, ultimately harming the overall efficiency and fairness of the market.

Competition authorities worldwide actively investigate and penalize entities involved in anti-competitive agreements to safeguard market integrity and consumer welfare.

What Constitutes an Anti-Competitive Agreement?

An anti-competitive agreement typically involves two or more enterprises operating at the same level of the production or distribution chain (horizontal agreements) or at different levels (vertical agreements).

Horizontal agreements between competitors are generally viewed with greater suspicion by competition authorities because they can directly eliminate rivalry. Examples include agreements

to fix prices, share markets, limit production, or rig bids.

Vertical agreements, such as those between a manufacturer and a distributor, can also be anti-competitive if they significantly restrict competition, for instance, through exclusive dealing arrangements or resale price maintenance, although their assessment often involves a more detailed analysis of their actual or potential effects on the market.

The key element in identifying an anti-competitive agreement is the presence of a “meeting of the minds” or a consensus between the parties to coordinate their market behavior in a way that reduces competition.

This does not necessarily require a formal contract; even tacit understandings or parallel conduct can, in certain circumstances, be considered evidence of a concerted practice that falls under the purview of anti-competitive agreements.

Cartels: A Severe Form of Anti-Competitive Agreement

Cartels are considered one of the most egregious forms of anti-competitive agreements due to their direct and significant harm to competition and consumers.

A cartel is essentially an agreement among competing businesses to lessen or eliminate competition among themselves. The most common activities of cartels involve fixing prices, controlling production or supply, allocating customers or territories, and rigging bids.

By agreeing on these crucial aspects of competition, cartel members eliminate the incentives to compete on price, quality, or innovation, effectively acting as a single monopolist.

This allows them to artificially inflate prices, restrict output, and earn supra-normal profits at the expense of consumers and other businesses that are not part of the cartel.

Competition laws in most jurisdictions treat cartel conduct as a per se violation, meaning that the agreement itself is considered illegal without requiring proof of its actual anti-competitive effects, given the inherent harm they cause.

Detecting and proving the existence of cartels can be challenging, as they often operate in secrecy, but competition authorities employ various tools, including leniency programs that incentivize cartel members to report the cartel in exchange for reduced penalties.

Bid-Rigging: Undermining the Procurement Process

Bid-rigging, also known as collusive tendering, is a specific type of anti-competitive agreement that occurs in the context of procurement processes, typically for government contracts or large private sector projects.

It involves an agreement among potential bidders not to compete genuinely for a contract. Instead of submitting independent, competitive bids, the participants in a bid-rigging scheme coordinate their bids to manipulate the outcome of the tender process.

Common forms of bid-rigging include:

- Bid Suppression, where one or more competitors agree not to bid or withdraw their bids;
- Complementary Bidding, where competitors submit bids that are intentionally too high or contain unacceptable terms to ensure that a designated bidder wins;
- Bid Rotation, where competitors agree to take turns being the winning bidder; and
- Market Division, where competitors agree not to bid on contracts in certain geographic areas or for certain customers, leaving those opportunities to others.

Bid-rigging directly undermines the integrity of the procurement process, leading to inflated contract prices, wasted public funds, and reduced opportunities for honest competitors.

Competition authorities and procurement bodies work together to detect and prevent bid-rigging through various measures, including bid analysis, market monitoring, and enforcement actions against colluding parties.

Consequences of Anti-Competitive Agreements

Engaging in anti-competitive agreements, particularly cartels and bid-rigging, carries significant consequences for the involved enterprises and individuals.

Competition authorities have the power to impose substantial financial penalties on companies found to have participated in such agreements. These fines can be a percentage of the company’s turnover and can amount to very large sums, serving as a strong deterrent.

In addition to financial penalties, individuals involved in cartel activities can face criminal prosecution and imprisonment in some countries. Companies and individuals harmed by anti-competitive agreements can also seek damages through private litigation.

Furthermore, being found guilty of anti-competitive conduct can severely damage a company's reputation, leading to loss of customer trust and exclusion from future public procurement processes.

The legal and economic ramifications underscore the importance for businesses to have robust compliance programs in place to prevent employees from engaging in anti-competitive behavior.

Conclusion

Anti-competitive agreements, such as cartels and bid-rigging, pose a serious threat to the proper functioning of markets and the welfare of consumers. By eliminating genuine competition, these agreements lead to higher prices, reduced quality, and stifled innovation.

Competition laws and authorities play a vital role in detecting, investigating, and penalizing such conduct to ensure that markets remain competitive and fair. Businesses have a responsibility to understand and comply with competition law to avoid engaging in practices that can result in severe penalties and reputational damage.

The ongoing efforts to combat anti-competitive agreements are essential for fostering a dynamic and efficient economic environment that benefits both businesses and consumers.