e-Pathshala पाठशाला

A Gateway to all Post Graduate Courses

MHRD Govt. of India

An MHRD Project under its National Mission on Education through ICT (NME-ICT)

Subject: LAW

Production of Courseware

e- Content for Post Graduate Courses

Paper : COMPETITION LAW

Module : Horizontal agreements in US and EU

ज्ञान-विज्ञान विमुक्तये

Q1: E-TEXT

Module 12: Horizontal Agreements in USA and EU

Module Overview:

This module will introduce the readers to the law related to the regulation of horizontal agreements in EU and USA. It willdescribe the standard of proof for analysing horizontal agreements anddiscuss the approaches followed in EU and USA for the assessment of anticompetitive effects on competition due to horizontal anticompetitive agreements. It will briefly describethe penalty for entering into such agreements and other important facets of such agreements covered under the respective laws. It will also delve on the approach towards the prosecution of cartel activity including the leniency programme adopted to bust cartels in EU and USA.This module will cover the legal provisions, standard of analysis, enforcement framework and other important aspects of regulation horizontal agreements in EU and USA.

Subject Name: Law
Paper Name: Competition Law
Module ID:12
Pre-requisites:

The readers are expected to know the nature of horizontal anticompetitive agreements and their types. Basic knowledge about the legal system of the USA and EU will help readers better appreciate the application of the discussed provisions related to regulation of anticompetitive horizontal agreements.

Objectives:

It is important to study the experienced jurisdictions like EU and USA as they have seen the application of competition law since long. The precedents and principles from these jurisdictions are considered to be useful for the interpretation of competition law. The objective is to make readers familiar with the legal rules applicable for regulating the anticompetitive effects of horizontal agreements including cartels. Readers will appreciate the need of adopting various ways of detecting and busting cartels and increase in new cooperation on cartel enforcement worldwide.

Keywords:

óPer seô rule, Rule of reason, Leniency programme, International cartels, Block exemptions

Module Introduction:

The earlier modules dealt with the definition, nature and types of horizontal agreements which can have anticompetitive effect on the competition. This module will introduce the readers to the regulation of horizontal agreements in EU and USA. USA is one of the oldest jurisdictions to enact law to regulate anticompetitive agreements. Competition law in USA is called antitrust law and the earliest Act is the Sherman Act of 1890. European Union which is union of 28 states has Treaty on the Functioning of the European Union (TFEU) which establishes a regional framework to regulate various aspects of the economy including competition law. Article 101 of the TFEU deals with the regulation of anticompetitive agreements including horizontal arrangements like cartels in EU.

Learning outcomes:

Through this module, the readers are expected to learn:

- Regulation of Horizontal Agreements in EU
- Horizontal Agreements in USA

- *Per se* and *Rule of reason* approaches
- Object and effect test
- Hard core cartel behaviour
- Fighting cartels through leniency programme

1. Horizontal Agreements in USA

1.1 Legal Regime

In USA, the antitrust laws comprising of the various legislations in general and the Sherman Act in particular, are regarded as ôthe Magna Carta of free enterpriseô with the aim of preserving competition, economic freedom and a free-enterprise system. Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have concurrent jurisdiction over civil anti-trust investigations, but the DOJ has exclusive jurisdiction over criminal matters. Each civil matter is assigned to either the FTC or the DOJ based on the agencies' industry expertise. Most states in USA have their own laws that mirror the federal anti-trust statutes. The Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 governs the extraterritorial application of the US antitrust laws.Under the FTAIA, the Sherman Act applies to antitrust conduct occurring outside of the United States when such conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and such effect proximately cause plaintiffôs injury.

Section 1 of the Sherman Act prohibits ôevery contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nationsô. As section 1 of Sherman Act refers to "contracts, combinations or conspiracies" in restraint of trade, some concert of action between two or more separate persons or entities need to be shown. Following are the ingredients of this provision:

a. agreement or conspiracy between at least two parties
b. analysing the competitive impact of the particular restraint in question

In Copperweld Corp. v. Independence Tube Corp[i]., the US Supreme Courtmade it clear that a corporation cannot be found guilty or held liable for conspiring with an unincorporated division or with a wholly owned subsidiary.
Parallel conduct alone does not establish a conspiracy. There must be something more than the ôconscious parallelismô. This something more is referred to as ôplus factorsô which need to be there to show the anticompetitive conduct. In *re Flat Glass* case provides example of such plus factors as: evidence that there was motive to enter into a price fixing conspiracy; evidence that the defendant acted contrary to its interests; and evidence implying a traditional conspiracy.[ii] As described by Judge Posner in high fructose corn syrup case[iii], two forms of evidence need to be adduced. It needs to be shown that the market structure is such that it is susceptible to collusion. Further, it needs to be shown that there is non-competitive behaviour in the market.

Puerto Rico Optometrists Group in Price-Fixing Conspiracy

Colegio is a not-for-profit association of professional optometrists practicing in Puerto Rico and has approximately 500 member optometrists, constituting all of the optometrists licensed to practice in Puerto Rico.As per the allegations, the association and some of its office bearers violated the antitrust rules by facilitating, negotiating, entering into, and implementing express or implied agreements among the members to refuse, or threaten to refuse, to accept vision and health care contracts except on collectively agreed-upon terms.

The FTCôs consent order settling these charges bars the group and the two leaders of the association from engaging in such conduct, while allowing them to undertake certain kinds of joint contracting arrangements by which physician participants control costs and improve quality by managing the provision of services. Here, it is important to note that a consent agreement is for settlement purposes only and does not constitute an admission of a law violation.

Source: Federal Trade Commission Press Release dated 30/07/2007, available at http://www.ftc.gov/news-events/press-releases/2007/07/ftc-charges-puerto-rico-optometrists-group-two-its-leaders (last accessed on 14/08/2014)

1.2 Standard of Analysis

As section 1 of the Sherman Act is rooted in criminal law, thus a higher degree of proof of collusion is warranted. US Courts developed the órule of reasonô approach based on the old common law doctrine of ancillary restraints. In 1911 in the Standard Oil Case[iv], it was held that only undue or unreasonable restraints should be illegal. Thus under the rule of reason, the pro- and anti-competitive effects of the agreement are weighed against each other, in its economic context, in order to determine whether the agreement in question enhances or reduces competition.Agreements do not need to be formal or in writing, but there must be a óconscious commitment to a common scheme designed to achieve an unlawful objective.ô

An agreement between actual or potential competitors to restrain their rivalry in some respect is commonly called a ñhorizontal restraint.ò Overtime, two main standards of analysis have evolved. These are óper seô rule and órule of reasonô. The most significant difference is that horizontal restraints are more likely to be deemed illegal per se and vertical restraints are more likely to be subject to the ñrule of reason.ò As per the DOJ/FTC Collaboration Guidelines[v], the test is whether the restraint in issueñis reasonably related to the integration and reasonably necessary to achieve its [efficiencyenhancing] pro-competitive benefits.

1.2.1 *Per Se* Approach

There are cases when the nature and necessary effect of restraint is so plainly anticompetitive that it should be treated as unlawful per se, without an elaborate inquiry into the restraint's likely competitive effect. In the US, ñper seò rule refers to categories of anti-competitive behaviour in antitrust law conclusively presumed to be an "unreasonable restraint on trade" and thus anti-competitive. Courts may condemn a restraint for per se violation of competition law for a variety of reasons. Such reasons may include by labelling a restraint "naked", "manifestly anticompetitive",

"pernicious", or by stating that the restraint is one with which the judiciary has "considerable experience" of harming competition.

Traditionally, illegal ñper seò acts involve horizontal market arrangements among competitors. Such acts include activities such as price fixing, geographic market division, group boycotts, and tying arrangements. In Northern Pacific Railway Co v. United States[vi], the US court held that ñthere are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Because of their pernicious effect on competition and lack of any redeeming economic value, per se agreements, like price fixing, bid rigging, and market allocation, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. If a per se violation is shown, defendants cannot offer any evidence to demonstrate the reasonableness or the alleged necessity of the challenged conduct.

Lysine and Citric Acid Cartels

This case saw and international price-fixing and volume allocation agreement among the world's major producers of lysine. Lysine is a feed additive used by farmers in livestock feeds and it is a $600 million industryworldwide. The members of the lysine cartel ð lysine producers from the United States, Japan, and Korea ð reached agreements to carve up the world market by allocating sales volumes among themselves and agreeing on what prices would be charged to customers worldwide. As a result, prices went up about 70 percent in the first three months of the conspiracy. A joint effort by the Antitrust Division of US DoJ and the FBI ð resulted in the conviction of five companies and six of their executives. The investigation yielded nearly $100 million in criminal fines.

Like the lysine cartel, the citric acid cartel involved an agreement among competitors to fix prices and allocate sales volumes in the worldwide market. Citric acid, a flavor additive and preservative in products found in nearly every home in the United States, such as soft drinks and processed foods, as well as detergents, pharmaceuticals, and cosmetic products. The conspirators including ADM, German, Swiss, and Dutch firms, and four of their executives agreed to fix prices and allocate sales volumes among themselves. They also agreed on complex systems to monitor and enforce the agreement. For example, the conspirators devised a compensation system whereby the cartel members reviewed the sales of each conspirator at the end of the year, and any company that sold more than its precisely allotted share in one year was required in the following year to purchase the excess from another conspirator that had not reached its volume allocation target in that preceding year. As a result of the conspiracy, list prices for citric acid were raised by more than 30 percent to customers in the United States during the conspiracy period.

Source: 'An Antitrust Primer for Federal Law Enforcement Personnel', Antitrust Division, U.S. Department of Justice (2005), available at http://www.justice.gov/atr/public/guidelines/209114.pdf

1.2.2 *Rule of Reason* Approach

Interestingly, if the prohibition of ñevery restraint of tradeò has to be read literally in section 1 of the Sherman Act, then every practice that limits to some extent a partyôs freedom of action can be declared unlawful under section 1 of the Sherman Act. This interpretation would lead to too extreme consequences and therefore soon after the enactment of the Sherman Act, the U.S. judges interpreted the legislative standard in section 1 of the Sherman Act in a reasonable way. This led to the development of órule of reasonô for analysing the anticompetitive effects of the agreements in USA.

In *Continental TV Inc v. GTE Sylavania*[vii], the USA Supreme Court defined the rule of reason as calling for a case by case evaluation where all the circumstances of a case are taken care of in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Thus, it is important to balance the pro- and anti- competitive effects of the agreement.

In a *Board of Trade of the City of Chicago* case[viii],Justice Brandeis held that the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. US Courts determine the legality of restraint by considering the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable competition. Further under the rule of reason approach, the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts which need to be taken care of while determining the effect of the restraint in question.

1.2.3 Quick Look Approach

The quick look is an abbreviated version of the rule of reason, in which proof of actual market injury such as sustained supra-competitive prices or reduced outputð or conduct of a type clearly likely to cause such market injuryð obviates the need for the more rigorous market and effects analysis that would normally be required to establish a plaintiff's prima facie case under the rule of reason.

Anticompetitive Practices while Standard Setting

Standards often facilitate economies of scale and interoperability, and promote consumer welfare. The primary objective of standards is to define technical or quality requirements. Standards can cover various issues, such as standardisation of different grades or sizes of a particular product, standardisation of production processes or methods, or technical specifications in markets where compatibility and interoperability with other products or systems is essential. In a globalised economy, standards are clearly more important than ever especially in sectors like mobiles, telecommunications and electronic products. Let us take an example of old case depicting as to how the standard setting process can have adverse effect on competition.

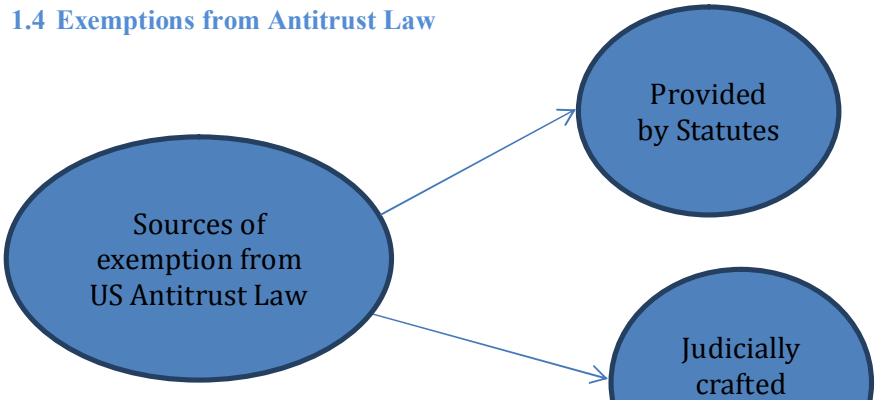
The standard-setting process is subject to abuse when a group of industry participants with a common interest agree on a product standard that excludes a new technology. An example of this problem can be illustrated by the US Supreme Court case of 1988, where the plaintiff successfully claimed that the members of a standards-setting trade association conspired to defeat adoption of the plaintiff's new technology. The plaintiff's case arose when certain members of the National Fire Protection Association improperly "packed" an Association meeting with steel industry sympathisers and voted down the plaintiff's proposal to include plastic as an approved material for making electrical conduit under the National Electrical Code. Until that time, the code permitted only the use of steel conduit. Holding in favour of the plaintiff, and finding that standard-setting procedures should be based on objective criteria judged through fair procedures.

Source: Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988).

1.3 Joint Ventures under Section 1

Normally joint ventures are analysed under Section 1 of the Sherman Act using the rule of reason. Thus, it needs to be determined whether the venture can lead to the exercise of market power, and if so whether the anticompetitive aspects outweigh any pro-competitive benefits. Three additional factors viz: openness, sharing of risk and increased efficiency, have emerged as crucial to determining legality of the joint ventures. If the parties continue to hold themselves as independent competitors to their customers, then joint venture will have characteristics of a per se illegal price-fixing conspiracy. Further, the joint venture must justify itself as improving efficiency.

1.4 Exemptions from Antitrust Law



Broadly speaking there are two sources of exemptions from antitrust laws in USA. These are exemptions carved out by statutes and judicially created exemptions. Certain industries are exempt from the anti-trust law by statute. Such statues include Webb Pomerane Act, 1918 providing an exemption for export cartels, Capper Volstead Act, 1922 providing an exemption for agricultural co-operatives, McCarren Ferguson Act, 1945 exempting the business of insurance and Clayton Act, 1914 exempting labour unions and permitting collective bargaining. Also, under the *'filed rate' doctrine* any regulated business which files its prices for approval by a regulatory agency, is eligible for immunity.

There are judicially created exemptions also. In *'state action' doctrine*, the conduct of an individual or business takes place under the state regulatorôs óactive supervisionô or law that clearly provides for approval of the restraint. State governments and agencies also enjoy the same immunity. The ó*Noerr-Pennington' doctrine* provides that private entities are immune from liability under the anti-trust laws for attempts to influence the passage or enforcement of laws, even if the laws they advocate for would have anti-competitive effects e.g., agency filings or lobbying activities.

Exemption from Antitrust Law

In 2007, U.S. Supreme Court held that the Securities Exchange Act of 1934 (SEA) heavily regulates securities trading; thus, certain activities that fall within the scope of the SEA are exempt from antitrust law. This case involved antitrust class actions in which investors brought suit against ten leading underwriters, alleging that they agreed to engage in anticompetitive tactics involving some 900 technology-related IPOs during the market "bubble" of the late 1990s.

Implied immunity is a defense exempting a defendant from antitrust liability in cases involvingthe application of the antitrust laws to conduct subject to another statutory and/or regulatoryscheme. The Court decided that if securities regulation and antitrust law are incompatible, then the securities regulation prevails and individuals who would otherwise violate antitrust law receive antitrust immunity. As per the court, determining incompatibility requires the presence of the following four criteria: 1) behavior squarely within securities regulation; 2) clear and adequate SEC authority to regulate; 3) active and ongoing SEC regulation; and 4) a serious conflict between regulatory and antitrust regimes.

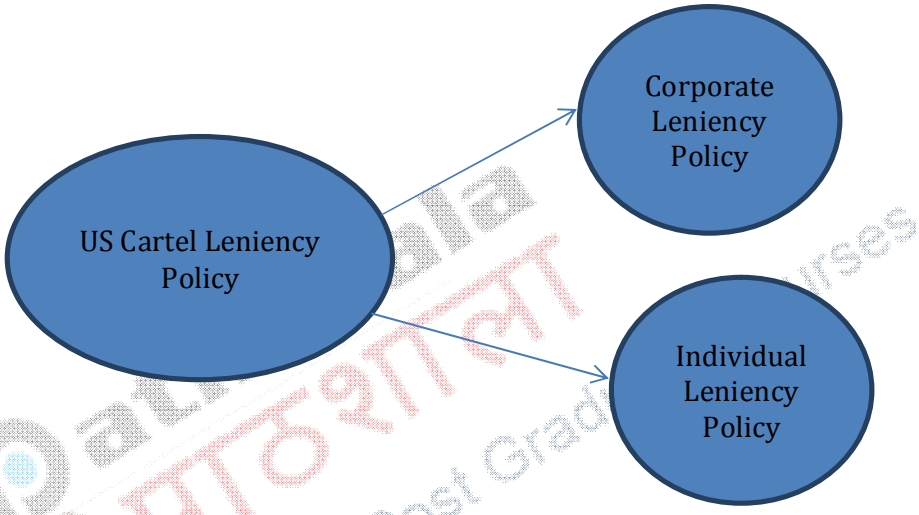
Source: Credit Suisse Securities (USA) v. Billing (05-1157). 127 S. Ct. 2383 (2007)

1.5 Leniency Programme in USA

The most important aspect of cartel detection and enforcement in USA is its leniency programme, which is also called amnesty program. The DOJ administers the leniency programme and is applied to criminal violations of section 1 of the Sherman Act. Antitrust Division has a long-standing policy of seeking criminal indictments only in cases involving per se violations of section 1, such as agreements to fix prices, bid-rigging and market or customer allocation.A company that self-reports and otherwise qualifies for the leniency programme avoids a criminal conviction and pays no

criminal fine. The program also can resultin de-trebling of damages in parallel civil cases if the amnesty applicant satisfies the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.Amnesty is granted only to the first cartel defector. A successful corporate applicant can also obtain leniency for itsdirectors, officers, and employees. Even leniency applicants who are not the first to apply can reap benefits fromthe programme, such as reduced fines, if they provide new information to the agency. In USA, leniency programme comprises of two policies:

- The Corporate Leniency Policy, which was first introduced in 1978 and substantially revised in 1993.
- The Individual Leniency Policy, which was introduced in 1994.



The Corporate Leniency Policy includes two types of leniency: Type A Leniency and Type B Leniency. Type A leniency offers immunity from prosecution wherean applicant is the first to approach the Antitrust Division before aninvestigation is initiated and if the following conditions are met:

a) At the time the company comes forward to report the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source.
b) The company, on its discovery of the illegal activity, took prompt and effective action to terminate its part in the activity.
c) The company reports the wrongdoing with candour and completeness, and provides full, continuing, and complete co-operation to the Antitrust Division throughout the investigation.
d) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
e) Where possible, the company makes restitution to injured parties.
f) The company did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

Type B leniency offers immunity from prosecution where an applicant is the first to approach the Antitrust Division after an investigation has begun and if the following conditions are met:

a) The company is the first to come forward and qualify for leniency in relation to the illegal activity being reported.
b) The Antitrust Division, at the time the company comes forward, does not yet have evidence against the company that is likely to result in a sustainable conviction.
c) The company, on its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity.
d) The company reports the wrongdoing with candour and completeness, and provides full, continuing, and complete co-operation that advances the Antitrust Division's investigation.
e) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
f) Where possible, the company makes restitution to injured parties.
g) The Antitrust Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing company's role in it, and the timing of the company's coming forward.

US legal framework also incorporates amnesty plus and penalty plus for better detection of cartels. Under Amnesty Plus, the Antitrust Division will give a benefit to a company being investigated for criminal activity in product market X for any criminal activity in another product market Y that the company voluntarily discloses, provided that the companymeets the requirements for leniency in product marketY.

Under the Penalty Plus policy, if a company in plea negotiations with the Antitrust Division fails to report its participation in aseparate antitrust violation that is subsequently discovered and successfully prosecuted, the Antitrust Division will urge the courtto consider thecompany's failure to report that misconduct as an aggravating factor when sentencing the company. For example, in February 2014, BridgestoneCorporation agreed to plead guilty and pay a criminal fine of US$425 million for its role in price fixing automotive anti-vibration rubber parts. Bridgestone's high fines reflected the company'sfailure to disclose its participation in the anti-vibration rubber parts conspiracy when the company pleaded guilty in 2011 to participating in the Marine Hose cartel pursuant to the Penalty Plus policy.

Under individual leniency policy, leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:
a) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
b) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
c) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.US cartel enforcement has widely benefitted from the adoption of new leniency policy since 1993. A large number of parties have sought the benefits of the US leniency programme in a number of notable recent

cases, including theDOJ' s investigations of a large number of auto parts cartels, the air cargo case, liquid crystal display (LCD) panels, dynamic randomaccess memory (DRAM) and numerous others.

1.6 Implications/Sanctions

Although most enforcement actions are civil, as discussed above, the Sherman Act is also a criminal law. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. Violations of section 1 of Sherman Act are punishable with fines of up to $100 million for corporations or $1 million for individuals, by imprisonment of up to ten years, or by both fines and imprisonment. USA uses incarceration, criminal fines, disgorgement and private damages litigation to fight cartels.

As a matter of practice, the DOJ proceeds criminally only in cases involving ñhard-coreò offences ï price fixing, bid-rigging, or market allocation. A court may impose up to 10 years in federal prison and $1m in fines on guilty individuals. In practice, sentences are usually shorter but there are heavy fines for violating the Sherman Act provisions.

Extradition of a foreign executive on criminal antitrust charges to the United States

In April 2014, the Antitrust Division of USA DOJ secured the first ever extradition of a foreign national to the US on an antitrust charge. Romano Pisciotti, an Italian national, was extradited from Germany on a charge of participating in a conspiracy to suppress and eliminate competition by rigging bids, fixing prices and allocating market shares for sales of marine hose sold in the United States and elsewhere. He is accused of playing an instrumental role in a multi-year bid-rigging conspiracy among manufacturers of marine hose, which is used to transfer oil between tankers and maritime storage facilities.During the conspiracy, the cartel affected prices for hundreds of millions of dollars in sales of marine hose and related products sold worldwide.

Source: US Department of Justice, Press release dated 04/04/2014 available at http://www.justice.gov/atr/public/press_releases/2014/304888.pdf (last accessed on 15/09/2014)

Under the Clayton Act, any person ñinjured in his business or propertyò by a violation of antitrust laws may file suit and recover treble damages and/or injunctive relief. Thus one can see mix of public and private enforcement in USA. Though, public enforcement through federal agencies is the primary vehicle through which cartels are discovered, yet follow-on litigation forming part of private enforcement provides a more flexible means for consumers to realise the damages. Thus DOJôs aim is prevention, detection, and penalisation while private enforcers seek redress.

In cases of detection of a cartel based on information provided by a whistle blower or amnesty applicant, the DOJ in most of the cases enter into plea agreements with the remaining cartel members. Interestingly, the DOJ permits defendants to enter into plea negotiations at any stage of investigation from its inception and its plea agreement policies are designed to enhance the likelihood of obtaining convictions by

seeking ever-increasing penalties for late-cooperating, or non-cooperating, defendants.

Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts

In plea agreements filed by the U.S. Department of Justice (DOJ) on September 26, 2013, nine automobile parts manufacturers agreed to pay more than $740 million in criminal fines to resolve charges of price-fixing of more than 30 different auto part products.
In this case, the companies, executives and co-conspirators engaged in the various price-fixing schemes by attending meetings and communicating by telephone in the United States and Japan to reach collusive agreements to rig bids, set prices and allocate the supply of auto parts sold to the car manufacturers. They took measures to keep their conduct secret by using code names and meeting in remote locations.
The US antitrust authorities coordinated with competition agencies of other countries incluing EU, Japan , Korea and Canada to detect, investigate and prosecute the cartel participants.

Source: Department of Justice, Office of Public Affairs, available at http://www.justice.gov/opa/pr/nine-automobile-parts-manufacturers-and-two-executives-agree-plead-guilty-fixing-prices (last accessed on 15/09/2014)

2. Horizontal Agreements in European Union

The European Union is made up of 28 member countries. Generally, a treaty is a binding agreement between EU member countries and sets out EU objectives, rules for EU institutions, the relationship between the EU and its member countries. There have been important treaties which mark the evolution of EU. These include: Treaty of Rome, entered into force in 1958; Brussels Treaty, entered into force in 1967; Maastricht Treaty, entered into force in 1993; and the latest being Treaty on the Functioning of the European Union (TFEU) also called Treaty of Lisbon which entered into force in 2009.
The competition provisions of the EU were principally established in the Treaty Establishing the European Community (Treaty of Rome). In EU, the text of the Treaty of Romeôs provisions related to competition law has remained substantially the same with some minor terminological modiýcations. The Treaty of Lisbon brought some terminological changes and also renumbered the provisions of the Treaty related to competition law. Further, all references to óEuropean Communityô and óCommunityô were replaced with a reference to the óEuropean Unionô or óUnionô. The European Court of Justice (ECJ) has been renamed the óCourt of Justice of the European Unionô and the European Court of First Instance the óGeneral Courtô.
Regulation 1/2003 lays down rules implementing the provisions of the TFEU relating to agreements, decisions by associations of undertakings and concerted practices which may restrict competition (Article 101 TFEU) and abuses of a dominant position (Article 102 TFEU).The new procedural framework[ix] of EU competition law from 1 May 2004 forms a system of decentralised enforcement and parallel competences, where the European Commission shares its competence with the national competition authorities (NCAs) of the member states of EU. The NCAs and the Commission form a network of public authorities co-operating closely together. This network called European Competition Network (ECN) provides a focus for

regular contact and consultation on enforcement policy and the Commission has a central role in the network in order to ensure to consistent application of the rules. The EU Commission's Directorate General for Competition (DG Competition) is responsible for enforcing EU competition rules. Termed by some authors as somewhat equivalents of section 1 of the Sherman Act, Article 101[x] EC prohibits agreements or concerted practices between undertakings which have as their object or effect to restrict competition and affecting trade between Member States.

2.1 Legal Regime

Article 101(1) TFEU prohibits any agreement or concerted practice between undertakings, or decisions of an association of undertakings, which has as its object or effect the prevention, restriction or distortion of competition, and which has an effect on trade between EU Member States. This prohibition applies across all member states of the EU and may also apply to cartel activity taking place outside the EU if the cartel has been implemented within the EU.

Art 101 (1) can be applied to a horizontal as well as vertical agreement. Art 101 TFEU lists three kinds of conducts that are prohibited: agreements between undertakings, decisions of associations of undertakings, and concerted practices. There is considerable overlap between these conducts and thus the aim is to check all the collusive conduct between undertakings. This also implies that some element of collusion is necessary.

Art 101 (1) contains an illustrative and non-exhaustive list of agreements which can be caught such as price fixing and market sharing. Agreements covered under Article 101 (1) are void and unenforceable and may attract fines, unless they satisfy the criteria set out in Article 101 (3). Following must be established for the application of Art 101 (1):

a. Existence of undertakings or association of undertakings
b. Collusion (agreements between undertakings, decisions of associations of undertakings, or concerted practice)
c. Collusion having object or effect the prevention, restriction or distortion of competition
d. Appreciable effect on competition; and
e. Appreciable effect on trade between member states

2.2 Standard of Analysis

The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition. The second step comes into play when an agreement is found to be restrictive of competition within the meaning of Article 101(1). The second step, under Article 101(3), is to determine the procompetitive benefits produced by that agreement and to assess whether these procompetitive effects outweigh the restrictive effects on competition.

Regulation 1/2003 entered into force on 1 May 2004 introduced a fundamental change in the enforcement of Article 101. It has introduced a system of self-assessment. Agreements that fulfil these requirements of Article 101 are deemed legal without the need for notification and a prior administrative decision, as was needed earlier. Under earlier regime which started from 1962, there was a centralised notification and authorisation system for Article 101(3) TFEU. Article 101(1) EC demands that the following three independent cumulative criteria are fulfilled:

- there must be an agreement between two or more undertakings;
- that agreement must have an impact on trade between Member States; and

Å agreement has as its object or effect the prevention, restriction or distortion of competition within the common market.

EU Fines International Air Freight Forwarding Services Cartel

Freight forwarders offer door-to-door air freight forwarding services to businesses and consumers. In a case, the cartelists established and coordinated four different surcharges and charging mechanisms and colluded on surcharges and charging mechanisms concerning important trade lanes, in particular the Europe-USA and the China/Hong Kong-Europe lanes. On 28 March 2012, the European Commission fined 14 international groups of companies a total of ú 169 million for participating in the period 2002-2007 in four distinct cartels aimed at fixing prices and other trading conditions for international air freight forwarding services. It was seen that the freight forwarders took specific measures to conceal the cartel behaviour and in one case email account was set up to facilitate exchanges and price related information between the cartel participants. Deutsche Post (including its subsidiaries DHL and Exel) received full immunity from fines under the Commission's 2006 leniency notice for all four cartels, as it was the first to reveal their existence the Commission.

Source: European Commission Press Release - IP/12/314, dated 28/03/2012, available at http://europa.eu/rapid/press-release_IP-12-314_en.htm (last accessed on 05/08/2014)

2.3.1 Object or Effect Test for Restricting Competition

Article 101(1) prohibits the agreements the object or effect of which is to prevent, restrict or distort competition. Further, the restriction on actual as well as the potential competition needs to be taken care of. The requirement of Art 101(1) is that the agreement must affect the trade between the member states.

The word object implies meaning and purpose of the agreement considered in the economic context in which it is to be applied and not the subjective intention of the parties. These are not cumulative conditions. If it is proved that the object of an agreement is to restrict competition, then Article 101(1) is infringed. In that case, there is further no need to look and prove that an agreementôs effect is the restriction of competition.

EU Commission fined three producers of canned mushrooms € 32 million in cartel settlement

In 2014, EU Commission found that three companies namedLutèce, Prochamp and Bonduelle participated in a cartel to coordinate prices and allocate customers of canned mushrooms in Europe. Canned mushrooms are mushrooms sold in tins and jars, except fresh mushrooms or frozen mushrooms. This cartel covered the sales of private label canned mushrooms via tender procedures to retailers and food wholesalers such as cash and carry companies and professional customers such as catering companies in the European Economic Area (EEA).

The overall aim of the cartelists was to stabilise the market shares of the companies involved and stop the decline of prices. To achieve this aim the cartel members exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers. The cartel was a non-aggression pact with a compensation scheme in case of customer transfer and application of minimum prices which had been agreed earlier.

Source: European Commission Press Release - IP/14/727, dated 25/06/2014, available at http://europa.eu/rapid/press-release_IP-14-727_en.htm (last accessed on 05/08/2014)

EU fines power exchanges in cartel settlement

The European Commission imposed a fine of ú 6 million on the two leading European spot power exchanges for agreeing to not to compete with each other for their spot electricity trading services in the European Economic Area (EEA). Franceôs EPEX Spot (EPEX) and Norwayôs Nord Pool Spot (NPS) were fined EUR 3.7 million and EUR 2.3 million for breaching competition law. EPEX and NPS agreed not to compete with each other and to allocate European territories between them. The Commission found that the companies breached Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement, which prohibits cartels.

Source: European Commission Press Release- IP/14/215, dated 05/03/2014, available at http://europa.eu/rapid/press-release_IP-14-215_en.htm (last accessed on 05/08/2014)

2.3.2 Appreciable Effect

De minimis rule: Article 101 TFEU is not applicable where the impact of an agreement on competition is not appreciable. Only agreements restricting competition to appreciable extent are prohibited. This doctrine stems from *Volk v. Vervaecke*[xi] decided by European Court of Justice (ECJ). This provides a "safe harbour" for minor agreements between companies below certain market share thresholds. Agreements between actual or potential competitors benefit from the "safe harbour" provided that the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the markets affected by the agreement. Agreements between companies that operate at different levels of the supply chain, like with most distribution agreements, the market share for benefitting from the safe harbour is 15 %.

The EU Commission guidance on de minimis doctrine can be found in recently revised notice[xii] of 2014. In the *Expedia* case, the EU Court clarified that anti-competitive agreements by object cannot be considered as minor agreements because by definition they have an appreciable impact on competition and as a result, such

agreements cannot benefit from a 'safe harbour' from the application of Article 101 TFEU. The revised notice of 2014 incorporates this judgment and thus incorporates a strict approach to the agreements having their object to restrict competition, which are mostly covered under the horizontal agreements.

2.3 Exemption under Art 101 (3)

An agreement which would otherwise be anticompetitive will escape prohibition if it has benefits that justify the anticompetitive effects. According to Article 1(2) of Regulation (EC) No 1/2003, agreements which are caught by Article 101(1) TFEU but which satisfy the conditions of Article 101(3) TFEU are not prohibited. Such agreements are valid and enforceable from the moment that the conditions of Article 101(3) TFEU are satisfied and for as long as that remain the case.

In 2004, the EU Commission published guidelines[xiii] providing guidance regarding the application of Art 101(3).There are four cumulative conditions for the applicability of Art 101(3). All four conditions must be satisfied in order to get exemption under Art 101(3).

These conditions are briefly explained below:

a. **Efficiency gains**
   This implies contribution to improving the production or distribution of goods or to promoting technical or economic progress. The parties need to

demonstrate that the efficiency gains are likely to be caused by cooperation and cannot be obtained by less restrictive means.

b. **Fair share for consumers**
The concerned undertakings to the agreement need to show that a fair share of the benefit from the agreement will go to consumers. The term ôfair shareô has not been defined and thus needs to be determined on a case to case basis.

c. **Indispensability of the restrictions**
It needs to be seen that whether the restrictions go beyond what is necessary to achieve the benefits. Thus, a restriction would be indispensable if its absence would significantly reduce or eliminate the efficiencies which would have followed from the agreement. This involves a balancing of pro-competitive and anti-competitive effects.

d. **No elimination of competition**
As per the fourth condition, theagreement must not afford the undertakings concernedthe possibility of eliminating competition in respect of asubstantial part of the products concerned. This requires a realistic analysis of the various sources ofcompetition in the market, the level of competitiveconstraint that they impose on the parties to theagreement and the impact of the agreement on thiscompetitive constraint. Both actual and potentialcompetition must be considered.

From the above list, it is clear that the conditions given in Art 101(3) are aimed at balanced assessment taking into account both restrictive effects on competition as well as pro-competitive effects. Earlier, only EU Commission had the power to grant exemption under Art 101(3). From May 1, 2004, in addition to the EU Commission, the national competition authorities or national courts may also apply Art 101(3). The pro and anticompetitive effects of the agreement are weighed against each other, in its economic context, in order to determine whether the agreement in question enhances or reduces competition.

2.4 System of Block Exemptions

Besides Art 101(3), there are also specific exemptions for specific categories of agreements and for specific sectors. These are called block exemptions. Examples include: block exemption 1218/2010 for specialisation agreements and block exemption 1217/2010 for research and development. There are block exemptions for specific sectors such as block exemption 3976/87 for the airline industry and block exemption 267/2010 for insurance sector. Such block exemption regulations describe the typical features of the agreements in the sector covered by the regulation and further describe the specific criteria the agreements must conform to qualify for exemption.

2.5 Leniency Programme in EU

The EU leniency policy was firstintroduced at EC level in 1996 and revised twice, in February 2002 and in 2006.The 2006 Leniency Notice[xiv]sets out the framework for the EU leniency programme. The EU Commission can grant immunity from any fine that otherwise would be imposed on an undertaking that discloses to the Commission its participation in a cartel affecting the EU provided that the undertaking is the first to submit information and evidence. As long as the Commission does not already have sufficient evidence to find an infringement and no undertaking has been granted conditional immunity from fines in connection with the cartel, such information or evidence must be such as to allow the Commission to either carry out a targeted inspection or find an infringement of Article 101 of the TFEU in connection with the cartel. There are other conditions which need to be satisfied:

a. The applicant for immunity must cooperate genuinely, fully, expeditiously and on a continuous basis with the Commission.
b. The applicant must not disclose the fact or any of the contents of its application to any one before the Commission has issued a statement of objections.
c. The applicant must not destroy, falsify or conceal relevant information or evidence.
d. The applicant must not have coerced other undertakings to join the cartel or to remain in it.
e. The applicant must end its involvement in the cartel immediately following its application for immunity, unless the Commission directs otherwise to preserve the integrity of inspections.

If the EU Commission finds that an immunity applicant has failed to meet all the conditions for immunity set out in the 2006 Leniency Notice, the Commission can also revoke the applicant's conditional immunity.

In case an undertaking that does not qualify for immunity described above, then it may benefit from a reduction in the fine that would otherwise be imposed. For reduction of fine an undertaking needs to provide the Commission with evidence of the alleged infringement that represents significant added value with respect to the evidence already in the Commission's possession. óSignificant added valueô implies that such evidence enhances the Commission's ability to prove the cartel.

Again in leniency cases undertaking must co-operate genuinely, fully, expeditiously and on a continuous basis with the Commission; must end its involvement in the cartel immediately after it has applied for a fine reduction, unless the Commission directs otherwise; and the applicant must not have destroyed, falsified or concealed evidence of the cartel.The Commission has got discretion to determine the level of reduction to be granted in specified bands. Such bands for reduction of fines for undertaking that provides evidence of significant added value are:reduction of 30% to 50% for the first undertaking; a reduction of 20% to 30% for the second undertaking; and a reductionof up to 20% for subsequent undertakings.

EU Commission fines Cathode Ray Tubes Cartel

On 5 December 2012, the EU Commission imposed fines totalling over EUR1.47 billion on seven producers of cathode ray tubes (CRT) for TVs and for computers for their involvement in one or both of two distinct cartels that operated between 1996 and 2006. The Commission found that eight international groups of companies fixed prices, shared customers, allocated markets, co-ordinated capacity and output, and exchanged sensitive commercial information about cathode ray tubes. The Commission identified separate cartels for CRTs for TVs and computers, and found that Chunghwa, LG Electronics, Philips and Samsung SDI had participated in both the cartels, while Panasonic, Toshiba, MTPD and Technicolor only had participated in the CRTs for TVs cartel. Chunghwa received full immunity from fines under the Commission's 2006 Leniency Notice for both cartels, as it was the first to bring these to the Commission's attention. Samsung SDI, Philips and Technicolor received reductions of 40%, 30% and 10% respectively for their co-operation under the EU leniency programme.

Source: European Commission Press Release- IP/12/1317, dated 05/12/2012, available at http://europa.eu/rapid/press-release_IP-12-1317_en.htm (last accessed on 05/08/2014)

2.6 Implications/Sanctions

It is crucial to understand various implications under the EU competition rules as the sanctions are designed not only to prohibit but also to prevent and detect the anticompetitive conduct. There are various consequences of infringing Art 101. First, the agreement prohibited will be automatically void. There is also risk of civil damages claims by the victims of the anticompetitive conduct of the horizontal agreement. The EU Commission has no jurisdiction to impose criminal sanctions on individuals or businesses.

The EU Commission can give a prohibition decision in accordance with the Article 7 of theRegulation 1/2003prohibiting the identified infringement. Alternatively Commission may take a commitment decision under Article 9 of Regulation 1/2003.Under the commitment decisions, the Commission voices its competition concerns and parties can come forward with commitments to address those concerns.If the Commission, after consulting market participants, finds these commitments sufficient, it takes a decision to make them legally binding. Thus, in commitment decisions there is no conclusion regarding the existence of an infringement of the competition rules. The commitments are usually in place for a specific period of time, and if the companies breach them they can be fined.

Table: Summary of Fines under EU Competition Law[xv]	
Basic Fine	Percentage of value of relevant sales (0-30%) **X** (multiplied by) Duration (years or periods less than one year) + (addition) 15-25% of value of relevant sales: additional deterrence for cartels
Increased by	Aggravating factors (e.g. ring leader, repeat offender or obstructing investigation)
Decreased by	Mitigating factors (e.g. limited role or conduct encouraged by legislation)
Subject to overall Cap	10% of turnover (per infringement)
Possibly further decreased by	Leniency: 100% for first applicant, up to 50% for next, 20-30% for third and up to 20% for others
	Settlement:10% reduction
	Inability to pay reduction

The Commission's fining guidelines aimed at punishment and deterrence were revised in 2006. Fining guidelines provide a framework for calculating fines and reflect the gravity and duration of the infringement. As per the guidelines, the starting point for the fine is the percentage of acompany's annual sales of the product concerned in the infringement (up to 30%). This is then multiplied by the number of years and months the infringement lasted. Certain aggravating circumstances (e.g. cartel ring leader or

repeat offender) and mitigating circumstances (e.g. limited involvement) may increase or decrease the fine. In cases involving cartels, as an additional deterrent, fine is increased by a one-time amount equivalent to 15-25% of the value of one year's sales. The maximum level of fine is capped at 10% of the overall annual turnover of a company.

The settlement procedure for cartels was introduced in EU in June 2008. Settlements are based on Regulation 1/2003, which allows the EU Commission to apply a simplified procedure when companies acknowledge their participation in the infringement and their liability for it. This reduces the length of investigations and has benefits for consumers, violators and competition authority as well. This is good for consumers and for taxpayers as it reduces costs; good for antitrust enforcement as it frees up resources to tackle other suspected cases; and good for the companies themselves that benefit from quicker decisions and a 10% reduction in fines.A claimant injured by the cartel or any other prohibited agreement may bring tortious or other proceedings including claiming damages before a national court. The Commission decision can be appealed to the EU General Court. Judgments of the General Court can be appealed before the European Court of Justice (ECJ) limited to questions of law only.

First settlement decision in DRAMCartel in EU

In 2010, European Commission adopted its first settlement decision in a cartel case involving 10 producers (Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya) of memory chips orDynamic random-access memory (DRAM) used in computers and servers. The fine totalling ú 331 273 800 included a reduction of 10% for the companies' acknowledgement of the facts.Micron received full immunity because it was the first to inform the Commission about the presence of the cartel.

The overall cartel was in operation between 1 July 1998 and 15 June 2002. It involved a network of contacts and sharing of secret information, mostly on a bilateral basis, through which the companies coordinated the price levels and quotations for DRAMs (Dynamic Random Access Memory), sold to major PC or server original equipment manufacturers (OEMs) in the EEA.

Source: European Commission Press Release - IP/10/586, dated 19/05/2010, available at http://europa.eu/rapid/press-release_IP-10-586_en.htm (last accessed on 05/08/2014)

The EU approach to horizontal agreements has taken vigorous enforcement action, specifically against hard core cartels. Enforcement actions include imposing heavy fines and also introduction of leniency programme for improved detection. On the other hand, approach towards horizontal agreements that are capable of producing economic synergies has become much more flexible with the adoption of more economics based approach.

3. Comparison between EU and USA

It is pertinent to mention some differences in the jurisdiction of EU and USA. USA has civil as well as criminal sanctions attached to the violators. The EU enforcement system is, by contrast, an administrative one, built around financial sanctions against

undertakings, not individuals. Unlike USA, there is no concept of treble damages in EU.A similarity can be discerned between the agreements having object of distorting competition covered under Art 101 TFEU with the agreements deemed *per se* legal under the Sherman Act in USA. However there is an important distinction in EU law that even if an agreement has its object of restricting competition, the parties can get exemption under Art 101(3).Thus it can be said that there are no agreements illegal óper seô in EU system.

Regulation and control of cartel activities is probably the area in competition law where one can see convergence in the principles of competition law in EU and USA.

The above discussion shows that EU and USA adopt a hard-line approach to the hard core cartel cases which are a type of horizontal agreements. In recent times, international cooperation for enforcement measures to check international cartels has increased manifolds. Cooperation between EU and USA to check international cartels in areas of detection, information sharing and enforcement has also increased.

4. Summary

This module dealt with the provisions related to the horizontal agreements in USA and EU. Controlling anticompetitive horizontal agreements, especially cartels, is the top priority in enforcement framework of USA and EU. Both the jurisdictions follow a strict approach towards cartels and have adopted leniency programmes for detecting and checking cartel conduct. Generally, USA follows óper seô rule in case of horizontal agreements and EU follows óobject basedô approach as a test for analysing the anticompetitive effects of horizontal agreements. The experience and principles developed in these mature jurisdictions in area of regulating horizontal agreements are very useful for devising strategies to check the anticompetitive effects of horizontal agreements.

---

[i] Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752 (1984),

[ii] In re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004).

[iii] High fructose corn syrup case

[iv] Standard Oil Co. of New Jersey v. United States

[v] Federal Trade Comm. & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations among Competitors, § 3.2 (2000).

[vi] 356 U.S. 1; 78 S. Ct. 514; 2 L. Ed. 2d 545; 1958 U.S. LEXIS 1777; 1958 Trade Cas. (CCH) P68,961

[vii] 433 United States 36, 49 (1977).

[viii] Board of Trade of the City of Chicago et al. v. United States, 246 U.S. 231.

[ix] Under regulation 1/2003 of the EU

[x] The terminology used in earlier treaty was Article 81.

[xi] Case 5/69 [1969] ECR 295, [1969] CMLR 273. In this case, a German washing machines manufacturer granted an exclusive distributorship to Vervaecke in Belgium and Luxembourg. As Volkôs market share was negligible, ECJ held that owing to the weak position of the parties the agreement has insignificant effect on the market and thus need not be condemned.

[xii] Notice on Agreements of Minor Importance OJ [2001] C 368/13 was the earlier notice. In 2014, the EU Commission has revised this notice. This is not a legally binding notice and provides clarity on the de minims doctrine. Newly revised notice can be found at: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice.pdf

[xiii] EU Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)

[xiv] European Commission's Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C298/17)

[xv]Table Source: Factsheet on fines, ôFines for breaking EU Competition Lawô available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf