**ANTICOMPETITIVE PRACTICES**

1. **Collusion** is an agreement, usually secretive, which occurs between two or more persons to deceive, mislead, or defraud others of their legal rights, or to obtain an objective forbidden by law typically involving fraud or gaining an unfair advantage. It can involve "wage fixing, kickbacks, or misrepresenting the independence of the relationship between the colluding parties. All acts affected by collusion are considered void.

In the study of economics and market competition, collusion takes place within an industry when rival companies cooperate for their mutual benefit. Collusion most often takes place within the market form of oligopoly, where the decision of a few firms to collude can significantly impact the market as a whole. Cartels are a special case of explicit collusion. Collusion which is not overt, on the other hand, is known as tacit collusion.

According to neoclassical price-determination theory and game theory, the independence of suppliers forces prices to their minimum, increasing efficiency and decreasing the price determining ability of each individual firm. However, if firms collude to increase prices loss of sales is minimized as consumers lack alternative choices at lower prices. This benefits the colluding firms at the cost of efficiency to society.

**Characteristics**

Practices that facilitate tacit collusion include:

- Uniform prices
- A penalty for price discounts
- Advance notice of price changes
- Information exchange

**Examples**

Implicit collusion in the form of price leadership and tacit misunderstandings still takes place. Examples of collusion in Kenya include:
Price fixing within the petroleum and public transport sectors.

Market allocation by soft drinks firms

There are many ways that implicit collusion tends to develop:

- The practice of conference calls and meetings of industry participants almost necessarily results in tremendous amounts of strategic and price transparency. This allows each firm to see how and why every other firm is pricing their products.
- If the practice of the industry causes more complicated pricing, which is hard for the consumer to understand (such as risk-based pricing, hidden taxes and fees in the wireless industry, negotiable pricing), this can cause competition based on price to be meaningless (because it would be too complicated to explain to the customer in a short advertisement). This causes industries to have essentially the same prices and compete on advertising and image, something theoretically as damaging to consumers as normal price fixing.

There are significant barriers to collusion. These include:

- The number of firms: As the number of firms in an industry increases, it is more difficult to successfully organize, collude and communicate.
- Cost and demand differences between firms: If costs vary significantly between firms, it may be impossible to establish a price at which to fix output.
- Cheating: There is considerable incentive to cheat on collusion agreements; although lowering prices might trigger price wars, in the short term the defecting firm may gain considerably.
- Potential entry: New firms may enter the industry, establishing a new baseline price and eliminating collusion (though anti-dumping laws and tariffs can prevent foreign companies entering the market).
- Economic recession: An increase in average total cost or a decrease in revenue provides incentive to compete with rival firms in order to secure a larger market share and increased demand.

2. Essential facilities doctrine
The essential facilities doctrine (sometimes also referred to as the essential facility doctrine) is a legal doctrine which describes a particular type of claim of monopolization made under competition laws. In general, it refers to a type of anti-competitive behavior in which a firm with market power uses a "bottleneck" in a market to deny competitors entry into the market. It is closely related to a claim for refusal to deal.

In order to establish liability by a plaintiff, the following must be proved:

1. control of the essential facility by a monopolist
2. a competitor’s inability to practically or reasonably duplicate the essential facility
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing the facility to competitors

**Application of the doctrine**

The doctrine has most frequently been applied to natural monopolies such as utilities and owners of transportation facilities; it has also been applied in situations involving intellectual property. For example, in Kenya, the largest brewery has patented all strains of barley grown in the country.

**3. Exclusive dealing**

It refers to when a retailer or wholesaler is ‘tied’ to purchase a good or service from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area. When the sales outlets are owned by the supplier, exclusive dealing is because of vertical integration.

Exclusive dealing can be a barrier to entry, it can be defended on the grounds that it is beneficial to consumers as it can allow after sales service to be better.

**Examples of exclusive dealing**

- Tied petrol stations that only deal with one petroleum supplier.
- Soft drink companies and their distributors
4. Tying

It is the practice of making the sale of one good (the tying good) conditional on the purchase of a second distinctive good (the tied good). It is often illegal when the products are not naturally related, e.g., requiring a bookstore to stock up on an unpopular title before allowing them to purchase a bestseller. Tying is related to freebie marketing, which is a common (and legal) method of giving away (or selling at a substantial discount) one item to ensure a continual flow of sales of another related item.

However, some kinds of tying, are regarded as anti-competitive practices because consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase a good they actually want (the tying good, and so would prefer that the goods be sold separately. The company doing this bundling may have a significantly large market share which makes it easy to impose the tie on consumers, despite the forces of market competition. The tie may also harm other companies in the market for the tied good, or who sell only single components.

Sales managers who oversee less attractive product lines are frequently responsible for initiating or attempting to initiate the tying of their products to higher quality products in the company's portfolio as a desperate effort to prevent the extinction of the product line and their job.

By threatening to withhold key product unless others are also purchased, the supplier can increase sales of less necessary products.

Types of tying

**Horizontal tying** is the practice of requiring customers to pay for an unrelated product or service together with the desired one, for example, if all of Bic's pens were sold only with Bic lighters.

**Vertical tying** is the practice of requiring customers to purchase related products or services from the same company. For example, a company's automobile only runs on its own proprietary fuel and can only be serviced by its own dealers.

Tying may be the action of several companies as well as the work of just one firm. Success on a tying claim typically requires proof of four elements:
(1) two separate products or services are involved;
(2) the purchase of the tying product is conditioned on the additional purchase of the tied product;
(3) the seller has sufficient market power in the market for the tying product;

5. A **cartel** is a formal (explicit) agreement among firms. Cartels usually occur in an oligopolistic industry, where there is a small number of sellers and usually involve homogeneous products. Cartel members may agree on such matters as price fixing, total industry output, market shares, allocation of customers, allocation of territories, bid rigging, establishment of common sales agencies, and the division of profits or combination of these. The aim of such collusion is to increase individual member's profits by reducing competition. Competition laws forbid cartels and therefore identifying and breaking up cartels is an important part of the competition policy in most countries, although proving the existence of a cartel is rarely easy, as firms are usually not so careless as to put agreements to collude on paper

**Types of cartels**

**Public cartels**

Public cartels are created when a government establishes and enforces rules relating to prices, output and other such matters. Export cartels and shipping conferences are examples of public cartels. In many countries, depression cartels have been permitted in industries deemed to be requiring price and production stability and/or to permit rationalization of industry structure and excess capacity. In Japan for example, such arrangements have been permitted in the steel, aluminum smelting, ship building and various chemical industries. Public cartels were also permitted in the United States during the Great Depression in the 1930s and continued to exist for some time after World War II in industries such as coal mining and oil production. Cartels have also played an extensive role in the German economy during the inter-war period. International commodity agreements covering products such as coffee, sugar, tin and more recently oil (OPEC) are examples of international cartels which have publicly entailed agreements between different national governments. **Crisis cartels** have also been organized by
governments for various industries or products in different countries in order to fix prices and ration production and distribution in periods of acute shortages.

**Private cartels**
These entail an agreement on terms and conditions from which the members derive mutual advantage but which are not known or likely to be detected by outside parties. Private cartels in most jurisdictions are viewed as being illegal and in violation of competition laws. Several factors affect the ability to monitor a cartel:

1. Number of firms in the industry.
2. Characteristics of the products sold by the firms.
3. Production costs of each member.
5. Frequency of sales and their characteristics.

### Number of firms in industry

The lower the number of firms in the industry, the easier for the members of the cartel to monitor the behaviour of other members. Given that detecting a price cut becomes harder as the number of firms increases, the bigger are the gains from price cutting. The larger the number of firms the more probable one of those firms being a *maverick* firm, that is, a firm known for pursuing aggressive and independent pricing strategy. Even in the case of a concentrated market, with few firms, the existence of such a firm may undermine the collusive behaviour of the cartel.

### Characteristics of products sold

Whether the products sold by cartels are homogeneous or differentiated also will affect the ability of monitoring and therefore the long-term sustainability of the cartel. Not only do homogeneous products make agreement on prices and/or quantities easier but also they facilitate monitoring. If goods are homogeneous, firms know that a change in their market share is more likely due to a price cut (or quantity increase) by another member. Instead, if products are differentiated, changes in quantity sold by a member may be due to changes in consumer preferences or demand. In the first case, change in one firm's demand is clearly due to cheating
by another member, whereas in the second case members may well not be cheating and still demand patterns change.

**Production costs**

Similar cost structures by the firms in a cartel make it easier to co-ordinate given that the firms will have similar maximizing behaviour as regards prices and output. Instead, if firms have different cost structures then each will have different maximizing behaviour and therefore will have an incentive to price or produce a different quantity. Changes in cost structure (for example when a firm introduces a new technology) also gives a cost advantage over rivals, making co-ordination and sustainability more difficult.

**Behaviour of demand**

If an industry is characterised by a varying demand (that is, a demand with cyclical fluctuations) this makes it more difficult for the firms in the cartel to detect whether such changes are due to demand fluctuations or to cheating by another member of the cartel. Therefore, in a market with demand fluctuations, monitoring is more difficult.

**Characteristics of sales**

As said, short-term gains from cheating (relative to long-term gains from collusion) make it more likely that a member will cheat. These short-term gains will partly depend on the frequency and amount of sales. If sales are not frequent (for example in some bidding markets where firms may have ten selling contracts) then the firms in a cartel may have an incentive to undercut the price of other sellers and win the contract (given that overall they know they will be few possible contracts). Moreover, the higher the amount of output to sell the higher the incentive for the firm to cheat. Therefore, low frequency of sales coupled with huge amounts of output in each of these sales make cartels less sustainable.

**EXAMPLES**

- As its name suggests, OPEC is organized by sovereign states. It cannot be held to antitrust enforcement in other jurisdictions by virtue of the doctrine of state immunity
under public international law. However, members of the group do frequently break rank to increase production quotas.

- Many trade organizations, especially in industries dominated by only a few major companies, have been accused of being fronts for cartels e.g. insurance and maize milling sectors in Kenya.

**6. Bid rigging** is an illegal agreement between two or more competitors. It is a form of collusion, which is illegal in most countries. It is a form of price fixing and market allocation, and it involves an agreement in which one party of a group of bidders will be designated to win the bid. It is often practised where contracts are determined by a call for bids, for example in the case of government construction contracts.

There are some very common bid-rigging practices:

- **Subcontract bid-rigging** occurs where some of the conspirators agree not to submit bids, or to submit cover bids that are intended not to be successful, on the condition that some parts of the successful bidder's contract will be subcontracted to them. In this way, they "share the spoils" among themselves.

- **Bid suppression** occurs where some of the conspirators agree not to submit a bid so that another conspirator can successfully win the contract.

- **Complementary bidding**, also known as **cover bidding** or **courtesy bidding**, occurs where some of the bidders bid an amount knowing that it is too high or contains conditions that they know to be unacceptable to the agency calling for the bids.

- **Bid rotation** occurs where the bidders take turns being the designated successful bidder, for example, each conspirator is designated to be the successful bidder on certain contracts, with conspirators designated to win other contracts. This is a form of market allocation, where the conspirators allocate or apportion markets, products, customers or geographic territories among themselves, so that each will get a "fair share" of the total business, without having to truly compete with the others for that business.
These forms of bid-rigging are not mutually exclusive of one another, and two or more of these practices could occur at the same time. For example, if one member of the bidding ring is designated to win a particular contract, that bidder's conspirators could avoid winning either by not bidding ("bid suppression"), or by submitting a high bid ("cover bidding").

Bid-rigging is a form of fraud, and almost always results in economic harm to the agency which is seeking the bids, and to the public, who ultimately bear the costs as taxpayers or consumers.

7. Refusal to deal is one of several anti-competitive practices forbidden in countries which have free market economies

8. Dividing territories (also Market division) is an agreement by two companies to stay out of each other's way and reduce competition in the agreed-upon territories. The term is generally understood to include dividing customers as well.

9. Conscious parallelism is a term used in competition law to describe price-fixing between competitors in an oligopoly that occurs without an actual spoken agreement between the parties. Instead, one competitor will take the lead in raising prices. The others will then follow suit, raising their prices by the same amount, with the unspoken mutual understanding that all will reap greater profits from the higher prices so long as none attempts to undercut the others.

This practice, like most anticompetitive practices, can be harmful to consumers who, if the market power of the firm is used, can be forced to pay monopoly prices for goods that should be selling for only a little more than the cost of production. Nevertheless, it is very hard to prosecute because it occurs without producing any evidence of collusion between the competitors.

10. Copyright misuse is an equitable defense against copyright infringement in the United States based on the unreasonable conduct of the copyright owner.

The doctrine forbids the copyright owner from attempting to secure an exclusive right or limited monopoly (usually through restrictive licensing practices) that is not granted by federal copyright law and is contrary to public policy. Finding that a copyright owner has engaged in misuse prevents the owner from enforcing his copyright through the securing of an injunction until he has "purged" himself of the misuse – i.e., ceased the restrictive practices.
11. **Predatory pricing** (also known as *destroyer pricing*) is the practice of a firm selling a product at very low price with the intent of driving competitors out of the market, or create a barrier to entry into the market for potential new competitors. If competitors or potential competitors cannot sustain equal or lower prices without losing money, they go out of business or choose not to enter the business. The predatory pricer has fewer competitors or a monopoly, allowing it to raise prices above what the market would otherwise bear.

In many countries predatory pricing is considered anti-competitive and therefore illegal. However, it is usually difficult to prove that a drop in prices is due to predatory pricing rather than normal competition, and predatory pricing claims are difficult to prove as a result of the requirement to prove the intent of a price reduction, and the goal of protecting legitimate price competition.

Predatory pricing through sharp discounting reduces profit margins for a business in the short run, as would a price war and will cause loss of revenue and/or profits. Yet businesses may engage in predatory pricing because it may pay dividends in the long run. This is because competitors who are not as financially stable or strong as the predator may suffer even more relative losses, due to loss of business or reduced profit margin caused by the aggressive price competition. After weaker competitor firms are driven out, the surviving business can raise prices above competitive levels (to "supra competitive pricing"). The business engaged in predatory pricing hopes to generate revenues and profits in the future that will more than offset the losses it incurred during the predatory pricing period.

In essence, the predator undergoes short-term pain for long-term gain. Therefore, for the predator to succeed, it must have sufficient strength (financial reserves or other sources of offsetting revenue) to endure the initial lean period. There must be substantial barriers to entry for new competitors.

The strategy may fail, however, if targeted competitors are not as weak as expected, or if competitors driven out are replaced by other competitors. In either case, this forces the predatory pricing period to become prolonged until possibly even the predator itself is forced to forfeit the
expected gain. The strategy may also fail if the predator is not able to endure the short-term losses for as long as it expected. Therefore, this strategy could hope to succeed only when the predator is substantially stronger than the competition and when barriers to entry of new competitors are high. Such barriers will prevent new entrants to the market from replacing others driven out, thereby allowing the supra competitive pricing to prevail for a sufficient period of time to more than make up for the short-term losses incurred by the predator.

12. Product bundling is a marketing strategy that involves offering several products for sale as one combined product. This strategy is very common in the software business (for example: bundle a word processor, a spreadsheet, and a database into a single office suite), in the cable television industry (for example, basic cable in the United States generally offers many channels at one price), and in the fast food industry in which multiple items are combined into a complete meal. A bundle of products is sometimes referred to as a package deal or a compilation or an anthology.

The strategy is most successful when:

- there are economies of scale in production,
- there are economies of scope in distribution,
- marginal costs of bundling are low.
- production set-up costs are high,
- customer acquisition costs are high.
- consumers appreciate the resulting simplification of the purchase decision and benefit from the joint performance of the combined product.

Product bundling is most suitable for high volume and high margin (i.e., low marginal cost) products. Research has shown that bundling is particularly effective for digital "information goods" with close to zero marginal cost, and could enable a bundler with an inferior collection of products to drive even superior quality goods out of the market place. In oligopolistic and monopolistic industries, product bundling can be seen as an unfair use of market power because it limits the choices available to the consumer. In these cases it is typically called product tying
Pure bundling occurs when a consumer can only purchase the entire bundle or nothing, mixed bundling occurs when consumers are offered a choice between the purchasing the entire bundle or one of the separate parts of the bundle.

Pure bundling can be further divided into two cases: in joint bundling, the two products are offered together for one bundled price, and, in leader bundling, a leader product is offered for discount if purchased with a non-leader product. Mixed-leader bundling is a variant of leader bundling with the added possibility of buying the leader product on its own.

13. Group boycott is a type of secondary boycott in which two or more competitors in a relevant market refuse to conduct business with a firm unless the firm agrees to cease doing business with an actual or potential competitor of the firms conducting the boycott. It is a form of refusal to deal, and can be a method of shutting a competitor out of a market, or preventing entry of a new firm into a market.

14. Resale Price Maintenance
RPM or vertical price fixing is the practice in which the manufacturers seek to fix the minimum or maximum retail price of their products. The manufacturer may impose the retail price on the retailer or it may be a joint agreement between the two on the prices to be charged.

RPM can be detrimental to consumers as it prevents them from negotiating discounts on the price of products/services. The other concern caused by RPM is that the differences in the retail costs of various retailers are not passed to the consumer in the form of different retail prices. As a result consumers do not enjoy lower prices as this practice effectively does away with interbrand competition. RPM may also facilitate collusion at the retail level. Owing to these, RPM is treated as a per se prohibition in some jurisdictions.

On a positive note, RMP encourages inter-brand competition, and helps overcome problems in the supply/distribution chain like free riding by retail price discounters and damaging competition between retailers located close to one another. It also assists in establishing optimal number and density of dealers and capturing economies of scale and scope in distribution.
RPM works well in markets where there is adequate and effective competition as is the case in developed countries. However, in cases where markets are highly concentrated, as is the situation in developing countries, it may not be beneficial and therefore it should be treated as a per se offence.

15. Exclusive Dealing

In exclusive dealing, the retailer enters into an agreement with the manufacturer or wholesaler not to stock competitor products. Franchise agreements contain agreements of this nature.

Exclusive dealing is considered necessary to maintain product image, reputation and also to assure product safety, quality and availability. It also affords manufacturers the opportunity to exercise control over their distribution chains for strategic reasons.

Exclusive dealing may also be anti-competitive especially if it has market foreclosure effect. This is likely to be the case if the manufacturer entering into exclusive dealing arrangements with his dealers has a dominant position in a particular market. The market foreclosure will correspond to the degree of market share that the dominant firm has thus heightening entry barriers in that market. This problem may be severe if the dominant firm has control over essential raw materials or facilities.

16. Territorial Exclusivity

It occurs when a manufacturer assigns distributors exclusivity within a geographical area or over particular class of consumers or goods; e.g. newspaper distribution. In this arrangements distributor are not expected to operate outside allocated areas. The advantage with this arrangement is that retailers are able to plan on the basis of allocated sales territory. However, this may also allow retailers to exercise market power in their area of operation.

17. Quantity Forcing
This happens when manufacturers/suppliers specify the minimum amount of goods that a distributor can buy. The manufacturer may also determine the number of orders to be received from a particular dealer.

18. Refusal to Supply

This is the case when a manufacturer limits the number of distributors of its products.

19. Service Requirements

In this case, a franchisor imposes on a franchisee a specified level of pre- and post- sales service or promotional effort; e.g. motor vehicle distribution. Minimum quality standards- by manufacturer on action of retailers e.g. floor space, sales personnel e.g. MacDonald’s- speed of service and cleanliness are prerequisites to be met by franchisees.

20. Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know how for the use and distribution of goods and services. In addition to the licence of IPRs, the franchiser usually provides the franchisee during the lifetime of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchiser is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchiser to establish, with limited investments, a uniform network for the distribution of his products. From the competition viewpoint, in addition to provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products distributed, in particular selective distribution and or non compete and or exclusive distribution or weaker forms thereof.

21. Exclusive supply

Exclusive supply means that there is only one buyer to which the supplier may sell a particular final product. The main competition risk of exclusive supply is the foreclosure of other buyers.
22. Selective distribution

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorized distributors, on the one hand, and the possibilities of resale on the other hand. The difference vis a vis exclusive distribution is that the restriction on the number of dealers does not depend on the number of territories but on the selection criteria linked to the nature of the product. Another difference vis a vis exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non authorized distributors, leaving only appointed dealers and final consumers as possible buyers. Selective distribution is almost always used to distribute branded final products. The possible competition risks are a reduction in intra brand competition and, especially in cases of cumulative effect, foreclosure of a certain type of a certain type or types of distributor and facilitation of collusion between suppliers and buyers.