LAWXPERTSMV. #COMPREHENSIVE NOTES

COMPETITION LAW

ANTI-COMPETITIVE AGREEMENTS

Origin:

Competition Act is based on the competition laws in the U.S. , U.K. and European legal systems.

- Anti-Competitive agreements constituted an integral part of the Clayton Act, 1914 of the United States of America,
- The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom laws.
- The legislative intent derived from the above mentioned legislations for the purposes of anti competitive agreements were the same for enforceability and regulatory purposes.

Concept: Anti-competitive agreements are those agreements that restrict competition. ***Section 3*** of the Competition Act, 2002 prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an **appreciable adverse effect on competition in India.**

Scheme of sec: 3 :

Sub Clauses (1) and (2) of Section 3, of Competition Act defines anti- competitive agreements and provides that any contravention with respect to such agreements shall be void. Under the sub clause (3), the section mentions factors

Definition of Agreement: The term 'Agreement' is broadly defined in section 2(b) of the Competition Act, 2002 and includes any *arrangement or understanding or concerted action*, whether or not it is formal, in writing or **intended to be enforceable by legal proceedings**. The agreements does not necessarily have to be a formal one and in writing or justifiable in a court of law and an informal agreement to fix prices will be hit by the provisions of the Competition Act, 2002.

WHY DOES INFORMAL AGREEMENTS IS INCLUDED > In **Registrar of Restrictive vs W.H Sniith** and sons," the court observed, people who combine together to keep, up prices do not shout from the house taps. They keep it quiet. 'They make their own agreements in cellar, where no one can see. They will not put anything into writing not even into word. A nod or wink will do. Parliament as well is aware of it. So it is **tactfully not only an "agreements" properly so called but any "arrangement" however informal.**

In ***Neeraj Malhotra vs Deustche Post Bank Home Finance Ltd***. & Ors., the competition commission of India, construed the term 'agreement' with all its dimensions as: "For an agreement to exist there has to

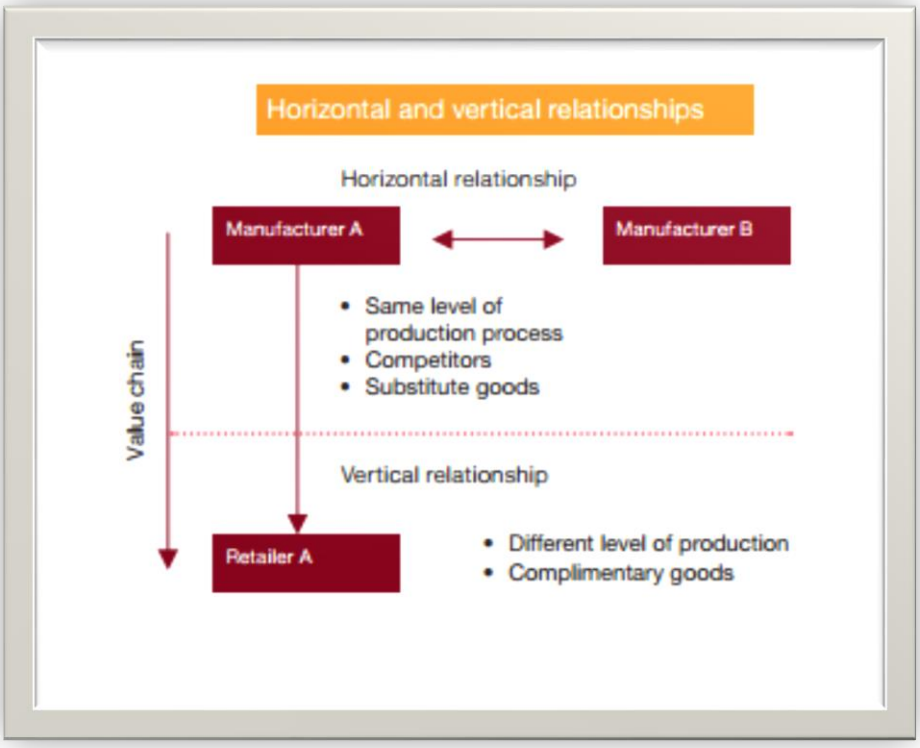
be an act in the nature of an arrangement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprises or persons. In this case, the allegation by the informant is that the act of charging prepayment interest/penalty is such an act. Furthermore, for an agreement, it is essential to have more than one party… An agreement is a conscious and congruous act that has to be associated to a point in time"

There are two types of agreement: Horizontal agreement and vertical agreement (explained infra):

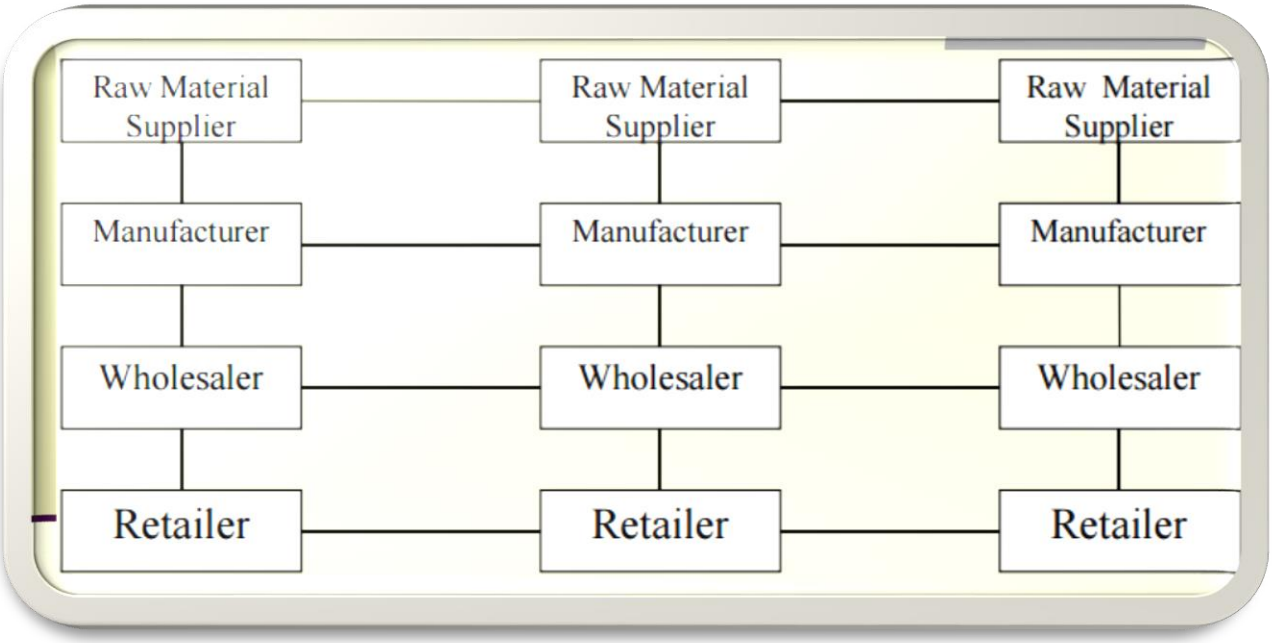
Horizontal Agreements: Agreement between rivals or competitors is termed as horizontal agreements. The most malicious form of an anti-competitive agreement is cartelization. **When rivals or competitors agree to fix prices or share consumer or do both**, the agreement termed as cartel. Horizontal agreements: Section 3(3) discusses about a specific class of agreements including cartels which are to **be presumed to be anti competitive.**

Vertical agreements: Besides horizontal agreements, there can be anti-competitive agreements between producers and suppliers or between producers and distributors. These are referred to as vertical agreements. Vertical agreements too can undermine competition in the market.

DIAGRAM DIFFERENTIATING TWO TYPES OF AGREEMENT:



ALL ROWS ARE HORIZONTAL AGREEMENTS PARTIES AND ALL COLUMNS ARE VERTICAL AGREEMENT PARTIES.



DETERMINATION OF ANTI COMPETITVE NATURE OF AGREEMENTS: When the question arises regarding the determination of true nature of an agreement whether it is actually causing any adverse effect to the market and competition or **whether it is harmless and pro-market.** Various courts around the world and in India have formulated the following rules to determine the anti competitive nature and effect of the agreements:

1) Rule of Reason
2) Per Se Rule Rule of reason

Rule of reason: The doctrine of Rule of reason was first stated and applied by the Supreme Court of U.S.A. in its interpretation of the Sherman Act in the case of **Standard Oil Co. of New Jersey v. United States** . Under this judgment, the supreme court of United States observed that

- any restraint on the market or competition under the then applicable Sherman Act would be anti-competitive until it is for promotional and pro-competitive purposes.
- Also the positions before and after the agreement came into force must be ascertained to evaluate the true nature of the agreement, whether it has actually caused any harm to the competition or not.
- Apart from this, the future probabilities of a negative effect upon the competition, is also to be considered to adjudge the agreement as anti competitive.

The supreme court of India officially paved way for the recognition of this rule when the MRTP Act was in force, under **TELCO v Registrar of RT Agreement.** This judgment Also the parameters under section 19(3) which are to be ascertained for the purpose of analyzing the nature and effect of an agreement, justify the applicability of rule of reason in the Indian context.

In formal terms : The Rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be. Rule of reason is however only applicable over the class of Vertical agreements, the agreements mentioned under section 3(4) of the competition act 2002. It has been observed that some market restrictions which prima facie seem to be anticompetitive may on further examination be found to have valid efficiency-enhancing benefits.

Per Se Rule: The per se rule, as defined by the Merriam-Webster's legal dictionary is- a rule that considers a particular restraint of trade to be manifestly contrary to competition and so does not require an inquiry into precise harm or purpose for an instance of it to be declared illegal.

- Agreements under section 3(3) of the competition act 2002, or Horizontal agreements are considered to be illegal and anti competitive ab-initio, i.e. from the very beginning
- Unlike vertical agreements, which are subject to the rule of reason and parameters under section 19(3) for ascertaining their true nature and legal validity, horizontal agreements are outright anticompetitive and thus prohibited without considering any criteria.

Agreements leading to collective boycotting, market division, price fixation and tying in arrangements are subjected to be adjudged as anti-competitive per se. such restraints falling under the category of horizontal agreements, cause an irredeemable harm to the market competition. The Per se rule, as a concept was originated by the US supreme court in 1898, the case **Addyston Pipe & Steel Co. v. U.S**.. This was also a rule formulated at the time of sherman act being in force in the United States. The agreement in question under this case was for the outright purpose of BID RIGGING by formation of a CARTEL. The court opined that the agreement had a direct economic impact and was of such nature that it could not be considered for a partial or limited restraint.

The crux: The agreements falling in section 3(3) of the Act shall be judged by 'shall be presumed rule' and onus to prove otherwise lies on the defendant.
Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including i) Tie-in agreement; ii) Exclusive supply agreement; iii) Exclusive distribution agreement; iv) Refusal to deal; v) Resale price maintenance, shall be presumed an anti-competitive agreement, if such agreements causes or is likely to cause an appreciable adverse effect on competition in India.

The agreements falling in section 3(4) of the Act shall be judged by 'rule of reason' and the onus lies on the prosecutor to prove its appreciable effect on competition in India.

Provision:

"Section 3 (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause ***an appreciable adverse effect on competition within India.***

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void "

EFFECT OF ACA: Section 3(2) of the Competition Act, 2002 declares that any anti competitive agreement within the meaning of section 3(1) of the Competition Act, 2002 shall be void. The whole agreement is construed as void if it contains anti – competitive clauses having appreciable adverse effect on the competition.

In Haridas export v. All India float gas manufacturers the commission says that It is immaterial in this regard that where the agreement is enterred into by or who are the parties of the said agreement, if that particular agreement has some adverse effect on the Indian market that is enough for considering that agreement as anti competitive.

MEANING OF THE TERM "APPRECIABLE ADVERSE EFFECT ON COMPETITION":

The term **'appreciable adverse effect on competition'** (AAEC) used in section 3, is not defined in the Act. However, the Act specifies a number of factors which the Competition Commission of India must take into account while determining whether an agreement has an appreciable adverse effect on competition or not. According to section 3(3) of the Act, the kind of agreements which would be considered to have an 'appreciable adverse effect on competition' would be those agreements which –

- Directly or indirectly determine sale or purchase prices;
- Limits or control production, supply, markets, technical developments, investments or provision of services;
- Share the market or source of production or provision of services by allocation of inter-alia geographical area of market, nature of goods or number of customers or any other similar way;
- Directly or indirectly result in bid rigging or collusive bidding.

Tata Sky –'set-top box interoperability case'– In this case, the challenge was to the anticompetitive practice of DTH operators in restricting interoperability of set-top-boxes. The CCI was of the opinion that there is no violation of §3 or §4 of the Act.1

Horizontal Agreements: Agreement between rivals or competitors is termed as horizontal agreements. The most malicious form of an anti-competitive agreement is cartelization. When rivals or competitors agree to fix prices or share consumer or do both, the agreement termed as cartel. Horizontal agreements: Section 3(3) discusses about a specific class of agreements including cartels which are to **be presumed to be anti competitive.**

R.S. Nayak v. A.R. Antulay and Sodhi Transport Co. v. State of Uttar Pradesh, where it held that "*the presumption is not in itself evidence but only makes a prima facie case for the party in whose favour it exists. It is not laying down a rule of conclusive proof.*"

Provision:

"Sec: 3 (3) of the Competition Act provides that Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including ***cartels****, engaged in identical or similar trade of goods or provision of services, which—*

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in ***bid rigging or collusive bidding****, shall be presumed to have an appreciable adverse effect on competition"*

Concept : Horizontal agreements are agreements between enterprises, group of enterprises, persons or group of persons, engaged in trade of identical or similar products. Horizontal agreements are entered between two or more competitors at same level of activity, for example- producers, distributers, manufacturers.

Purpose of horizontal agreements: Usually the essence and purpose of horizontal agreements is to generate policies regarding production, distribution and price fixation. Also such agreements provide a channel for sharing of information which can usually be price sensitive and may influence the market. Such practices adversely affect competition by prompting antitrust law violations. Horizontal agreements also affect prices and quality of products in the market.

Restriction on horizontal agreements: Section 3(3) broadly provides for the restriction of following as being anti competitive in nature-

- Agreements,
- practices,
- Decisions and
- Cartels

If they are of following characteristics:

a) Agreements that directly or indirectly determine purchase or sale prices:

b) Limits or controls production, supply, markets, technical development, investment or provision of services

According to Livingstone - An example of such an agreement is one where there is a clause that the distributor must ensure the selling of 100 cylinders a month. limitation of sales has a similar effect as well as discouraging competition for new entrants.

c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or the number of customers in the market or any other similar way .

Prof. Whish observes that geographic market sharing is particularly restrictive from the customers' points of view since it diminishes choice; at least where the parties fix prices, a choice of product remains and it is possible that restriction of price competition will force parties to compete in other ways. Market allocation agreements eliminate the need to police the pricing practices of the companies which are parties to the agreement and the need for producers with different costs to agree on appropriate prices.

d) Directly or indirectly results in **bid-rigging or collusive bidding** .

Cartels: The term 'Cartel' finds its mention under section 3(3) of the Competition Act.

What are cartels: Broadly, Cartels are such agreements, which are explicitly and formally entered by market players. These agreements form a part of a concerted action by the market players to join hands and get together to a consensus to abide by certain anti competitive practices which affect the market competition negatively. For a cartel to be in existence it need not necessarily meet every day or do something daily to be said to exist. Even a single series of meetings or concerted action with the clear intent to limiting output or fixing prices is sufficient condition for a cartel. As long as the reigning prices and market conditions exist due to the actions of the cartel, the cartel itself would be considered to be continuing.

Cartels are per se bad. It not only includes acts preventing or restraining the trade or competition, but also any attempt to do such type of restrains.

There are typically four types of cartel conducts:

• price fixing
• market sharing
• output restricting
• bid rigging

Elements of Cartel:

Two things are important in this regard, one is adverse effect, means the consequence of the said agreement should be adversely affect the competition ***# U.S v. Griffith,*** and second thing is the intention of the parties to the agreement, but alone intention is not enough, there should be some overt act to give effect to that specific intention ***#Ashton v. CIR.***

In **Builders Association of India (hereinafter "the Cement case"),** decided in June 2012, the Commission came to the conclusion that a group of cement manufacturers under the umbrella organisation of the Cement Manufacturers Association (hereinafter "CMA") had indulged in cartelisation, in contravention of Section 3(3) of the Act. Since the cement industry was de-controlled in 1989, and the subsequent consolidation of cement manufacturers during 2001-02, the cement industry has been widely characterised as an oligopolistic market, operating through anti-competitive collusion. Attempts have been made since 1991 to hold liable cement manufacturers for collusive price setting under the MRTP Act. However, these efforts were largely unsuccessful.

In 2012, the DG inter alia found that there had been a significant rise in cement prices over the time period under investigation, and such price increases were attributed to more than just natural reasons, such as rise in cost of raw materials. Relying heavily on circumstantial evidence, it concluded that market forces alone did not determine price, with prices moving "in the same manner and same direction" pursuant to regular meetings held by members of the CMA. Consequently, the Commission imposed a hefty cumulative fine of Rs. 6,300 crore on the parties.

In stark contrast to this decision, in October 2012, in **All India Tyre Dealers' Federation** (hereinafter "the Tyre case") the Commission found that since the tyre manufacturing market is highly concentrated and oligopolistic in nature (thereby making it ordinary for each party to know what the other is doing) meetings held by the manufacturers did not amount to cartelisation under Section 3(3) of the Act.

It is settled law in a variety of jurisdictions, including India, that price parallelism between parties is not enough to prove a claim for cartelisation. Indian law, like the law of the European Union and the United States, requires "plus factors" in addition to just similarity in pricing to be punishable for cartelisation under Section 3(3) of the Act.

Soda ash cartel: Alkali Manufacturers Association of India v. American Natural Soda Ash Corporation is very important. This cartel was related to soda ash. Before formation of this cartel, there were 6 producers of soda ash, they were acting independently, after formation of this cartel they started to produce soda ash and supply them throughout the world in a very cheap rate. For this reason the local producers of different nations started to face difficulties to survive in the competition. In Indian also the same problem occurred. The Government of India charged a very high rate of anti dumping duty upon this cartel

The Orissa High Court in **Jagdamba Packaging** found that petitioner had formed and indulged in cartel formation were irrelevant in the context of a tender floated by the Ordinance Factory. The tender had to be

considered on the basis of tender conditions and until the price bid was opened, the mere use of the letterhead of another company participating in the tender by petitioner, could not substantiate the ground that they had entered into a cartel

Banks Case – 'pre-payment penalty case' – This was the first major decision of the CCI. The case involved an allegation of cartelization and abuse of dominance by banks in charging a pre-payment penalty on home loans. The majority view was that there were no violations of either §3 or §4 of the Act.A couple of similar matters relating to bank loans were decided by the CCI and found no violation of the provisions of the Act.

Bid Rigging and Collusive Bidding: Explanation to sub clause (3) of section 3 explains the term "bid rigging" or "collusive bidding" for the purposes of section 3 (3) d, which says that an agreement resulting in bid rigging or collusive bidding shall be presumed to have an AAEC. Bid rigging is an outcome of horizontal anti competitive agreements. According to the explanation- "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Jupiter Gaming – 'bid-rigging case' – This case was interesting as it began with the information alleging abuse of dominant position by the Government of Goa in prescribing tender conditions for selecting online lottery agents. During investigation, a tacit understanding/collusion was suggested by the DG. The CCI, however, found no violation either under s:3 or s:4 of the Act.

ATF cartel: The RIL has filed a complaint to the competition commission of India against the Public Sector Undertakings dealing with aviation turbine fuel. RIL alleged that they formed a cartel at the time for bidding for the ATF. PSU like IOC, BPCL, HPCL all were engaged in that cartel. RIL wanted to enter into the business of supplying the ATF to the Jet Airways, but for this cartel it failed to do this.

Cartel in Road Transport: Road transport is considered as lifeline of the economic growth of any country, so India is not the exception to this. We can take example of Germany's Autobhan, which makes a revolutionary change in the economic position of this country by connecting the major cities with the remote villages. At the beginning the road was considered as public matter and exclusively made by the Government, but with the changing of the time it is not possible for the Govt. to take all the responsibilities regarding the road transport, there is also a factor of investment. Particularly for the maintenance and for investing more fund with the increasing demand private and foreign investors come into the picture. Competition starts between them. There is no doubt that this road transport sector of India is huge and also very profitable, so the investors starts to inter into anti competitive agreements and also bid rigging, which are totally prohibited under the Competition Act 2002. There are also instances of entry barriers, resulting territorial allocation of contracts, which are also prohibited under the Act. Illegal competition is also going on with the raw materials needed for the road construction, like steel, roads, cement etc. Proper road transportation system is required for better implementation of the socio-economic policies of the country. It also affects the price of the goods. So, the CCI

should make appropriate provisions to give a check and balance method to control the anti competitive activities in road transportation system.

Railway cartel: In the very recent time it comes into picture that in Indian Railway a cartel is going on regarding the seats of the compartments. Previously foam was used to make these seats. Suddenly the RDSO, which is the research and development wing of Railway shifted to a new material called recron for making seats. It comes to know from an investigation that the recron seats take Rs. 50000 for one compartment, whereas the foam made seats charged Rs 18000 per compartment, the investigation further says that this recron is not suitable for the Indian weather also. The whole supply of the recron is given to two suppliers, without calling a tender for that and these two suppliers charged near about 200% more than the market rate of the recron seats. So, there is no doubt that these two vendors of recron act as cartel and the RDSO would never make any doubt regarding this.

Another type of cartel in Railway can be found in **Competition Commission of India v Steel Authority of India Limited** and another, this case was filed by one company against the SAIL, alleging that it entered into an exclusive agreement with Indian Railway for supplying of steel for the railway track.

Trucking cartel: Trucks are considered as the lifeline for the transportation of goods in India. In a country like India, transportation of goods plays a vital role in determining the price of goods. In this sector also we can find a huge cartel, which was consisted by some of the truck operators. They fixed the fare of the truck transportation and restrained the other truck operators to compete with each other regarding the price fixation. As a result of this there was an abnormal increase in the transportation cost, which leads to increase the price of the respective goods, causing detriment to the consumers. The MRTP Commission gave a cease and desist order to some of the truck operator union but as there was no provisions regarding penalties, so there were no penalties for these operators .

Vitamin cartel: It is an international cartel, but affected India also. During 1990s some pharmaceutical companies from Japan, France and Germany entered into a cartel regarding the fixation of the price of the vitamins throughout the world and also made some division of market for vitamin throughout the world. This cartel was continued for a period of near about 10 years. Then France came out from this and coordinates with the US to restrain this cartel. France paid a huge amount as fine for this. India also faced a great loss for this cartel, but in the absent of any provisions relating to the oversee jurisdiction, no penalty was imposed by India.

Vertical agreements: Besides horizontal agreements, there can be anti-competitive agreements between producers and suppliers or between producers and distributors. These are referred to as vertical agreements. Vertical agreements too can undermine competition in the market.

Definition: Vertical agreements are the agreements at different stages or different levels of market chain. Franchising is a form of vertical agreement, where the agreement is for leasing the right to use a brand's business model and name by a retailer.

Under the Competition Act 2002, section 3(4) provides for agreements which are entered by entities at different stages of production chain: The section provides for various types of vertical agreements under sub clauses (a) to (e). Rule of reason is employed to declare them as anti-competitive agreements.

Provision:

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Explanation.—For the purposes of this sub-section,—

Tie – in arrangements :

Defined in explanation to above section as follows:

*(a) "**tie-in arrangements**" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods"*

WAYS TO TIE A PRODUCT:

In principle, there are three ways to tie products:

(1) **Contractual tying**, which, as the name implies, takes place when the monopolistic firm requires the buyer in the purchase agreement to purchase the tied product as well;

(2) **Technical tying,** which occurs when the monopolistic firm technically links the tying product and the tied product together so that the consumer is forced to purchase both of them; and

(3) **Tying through "economic coercion**," which takes place when the monopolistic firm offers both products, the tying and the tied, together, at a discount so significant that it actually negates the consumer's economic freedom not to purchase the tied product

The basic requirements of Tie-in arrangement to be illegal.

1. There must be two separate products or services.

2. There must be a sale or an agreement to sell one product (or service) on the condition that the buyer purchase another product or service (or the buyer agrees not to purchase the product or service from another supplier).

3. The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.

4. The tying arrangement must affect a "not insubstantial" amount of commerce.

Courts are nearly unanimous in agreeing that these are the basic requirements of a tying claim.

Testing the legality of tie-in arrangements: The legality of tie-in arrangement is test by application of rule of reason. Under, the rule of reason, courts will use a balancing test, or a "look at all the facts" approach. The courts will examine both the positive and negative effects of the arrangement to see if one outweighs the other. This type of analysis is not used for per se violations.

Another requirement for an illegal tying arrangement, however, requires the courts to examine the degree of market power that the seller has in the various markets. This type of market analysis is used in the rule of reason.

The Kodak Case:

No discussion of tying would be complete without mentioning the case of **Eastman Kodak Company v. Image Technical Services, Inc.** Although this case dealt with numerous aspects of tying law, the case focused on the requirement of market power in the tying market.

FACTS : Kodak manufactures and sells photocopiers and micrographic equipment and also sells replacement parts and service for its equipment. Independent service organizations (ISOs) also provide service for Kodak equipment, typically at a lower price than that offered by Kodak. Customers of Kodak equipment could buy the replacement parts themselves and hire the ISOs to service the machines or they could hire the ISOs to provide both the replacement parts and the service. Or, customers could use Kodak to obtain the replacement parts and service.

Kodak eventually instituted a policy of selling the replacement parts only to those buyers of Kodak equipment who purchased Kodak services to repair their machines. Kodak tried to limit the access the ISOs had to replacement parts for Kodak machines. This effectively limited the ability of the ISOs to repair Kodak machines for their customers. A number of ISOs finally filed suit, claiming that Kodak unlawfully tied the sale of service for Kodak machines to the sale of parts. Thus, the tying arrangement was allegedly between Kodak's repair service and its parts.

ISSUE : In Kodak, the issue was whether Kodak had sufficient economic power in the tying product market (for Kodak parts) to appreciably restrain competition in the tied product market (Kodak service).

CONTENTION OF KODAK : Kodak claimed that while it might have a monopoly share of the parts market, it could not actually exercise market power because there was competition in the equipment market, the primary market. Thus, Kodak argued that its lack of market power in the primary equipment market precluded a finding that it had power in a derivative aftermarket, i.e., the market for services for that equipment. The Court rejected this presumption, finding no basic economic reality which dictates that competition in the equipment market cannot coexist with market power in the derivative aftermarket.

COURT'S VIEW: Instead, the Court adopted the reasoning of the ISOs, that there were significant information and switching costs that would affect the behavior of consumers seeking to purchase either equipment or services. For example, there is an information cost that purchasers must understand when they purchase the equipment. In order for consumers to fully consider their servicing needs, they must be able to engage in "lifecycle" pricing, or pricing that takes into account not only the initial cost of the equipment, but also the costs of services needed after the purchase. Likewise, switching costs also affect the market. Consumers who have already purchased one type of equipment are more likely to accept an increase in price for the servicing of that equipment before they will switch to another piece of equipment. Under Kodak, then, market imperfections -- or "market realities" as the Supreme Court called them -- can provide the necessary economic power in the tying market required for a per se tying violation.

OTHER CASES:

CAUSE TITLE	PRODUCTS TIED IN.	DECISION OF CCI
In Re RP Electronics case	Electronics and their annual maintenance were made as single product.	Held to be tie- in arrangement having AAEC
Chanakya and Sidarthana Gas Company	Gas connection service was tied in with gas stove product.	Tie-in arrangement having AAEC
In Re Rajasthan Bank	Fixed deposit + Locker facility	Tie-in arrangement having AAEC
Amarjeevan Public school case	Uniform + Books + Education	Tie –in arrangement having AAEC
United Radio and TV Company	Stabilizer + TV	Tie-in having AAEC

All the above cases were over ruled in, **In Re TCI case** where the car sale was tied in with AC serive for car,(i.e.,) those who purchase car must compulsorily take AC service. This was held to be tie-in arrangement not having AAEC as it only promoted the quality of the car (product)

EXCLUSIVE SUPPLY AND EXCLUSIVE DISTRIBUTION AGGREEMENT:

Concept: ***Exclusive supply arrangements*** includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Whereas **distribution agreements** includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. They have been defined under the Explanation (b) and (c) to subsection (4) of section 3 of the Competition Act 2002.

Purpose of such agreement: Such agreements originate principally to cater to the manufacturer s need to promote his branded product at all stages of distribution, down to the consumer. As a result of which, the competitors are prevented access to the market and the dealers are denied freedom to handle competing products. In this process, the consumer is also restricted in his choice among the number of competing products.

In landmark verdict of **Telco vs RRTA,** the Supreme Court observed that exclusive dealership in this case did not impede competition rather promoted it because they led to specialization and improvement in after –sales services, and by specialization in each make of vehicle and providing the best possible service, the competition between the various makes was enhanced. Wherein the exclusive arrangement was found to be essential for the survival of the respondent firm and competition, it was held that there is no affect on competition and therefore, it is not violative of law. When dealers are required not to deal directly or indirectly in sale of similar goods, it is then held to be restrictive in case of exclusive dealing.

In **Tata Engineering and Locomotive Co. vs Registrar of restrictive Trade Practices**, the Supreme Court did not find the distribution of areas between the company's distributors as being restrictive. To sum it up, whenever there is a categorical condition in the agreement, that the purchaser shall not buy from any other party the specified products for sale or the terms of the agreement are shown to be on a principal to – principal basis, then they are held to be restrictive and reducing competition in the market.

Airlines case – This case related to a proposed alliance between Jet Airways and Kingfisher. The agreement included code-sharing on both domestic and international flights and joint fuel management with a view to reduce expenses, as well as common ground-handling, cross selling of flight inventories using a common global distribution system platform and cross-utilisation of crew on similar aircraft types were the other key areas of the proposed agreement. The CCI, however, found that "none of these agreements can be said to have either determining the airfares or limiting the supply or allocating the market" and thus no violation of either sec:3 or sec:4 was found to have been established and the matter was closed.

REFUSAL TO DEAL AGREEMENT:

Definition: The section 3 sub-section (4) of the Competition Act defines it as including any agreement which restricts or likely to restrict by any method the persons or classes of persons top whom goods are sold or from whom goods are bought.

Mere non- supply is not refusal to deal : Mere non supply of goods to a dealer does not amount to refusal to deal, unless it is the outcome of non-adherence to some restrictive covenant, e.g. tie-ups sales, area restriction etc. what is required to b seen is the effect of such practice on competition and whether it results in or is likely to result in foreclosing market s to competitors.

The US Supreme Court in case of **Aspen Skiing Co vs Aspen Highlands Skiing Corp**, that refusal to deal can be abused when access is denied after having been granted in the past. Further, a player in a dominant position can impose restriction s or a player who is the provider of the technological development in the service concerned. In **RRTA vs Bata India Ltd** engaged in the manufacturer of leather and rubber canvas footwear, entered into agreements with small – scale manufactures for purchase of footwear to be sold by it under its own brand. The agreements prohibited these manufactures from purchasing raw material and components from parties other than those approved by Bata. It also required them to use the moulds sold/supplied by Bata exclusively for manufacturing for Bata s requirement. The Commission held that these conditions imposed by Bata is restrictive trade practices and prejudicial to public interest.

RESALE PRICE MAINTENANCE AGREEMENT:

Definition: Explanation (e) to Sub –section 4) of the Section 3 of the Act defines resale price maintenance. It includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. Resale price maintained is in some countries treated under the "per –se" rule, e.g. in the US because it could be the sign of a cartel. Further, Section 3(5) of the Competition Act explicitly exempts the applicability of section 3 to - Agreements containing reasonable conditions to protect any of his rights; and Rights of a person to restrain any infringement of his rights.

In **M/s Jasper lnfotech Private Limited (Snapdeal) v.M/s Kaff Appliances (India) Pvt. Ltd., 2014**, the CCI held that display of products at prices less than that determined by the dealers/distributors, hinders their ability to compete and is thus a violation of Section 3(4)(e) read with 3(1) of the Act. Similarly, imposition of restrictions on the dealers to deal with competing brands in the market and thereby restricting the interbrand competition too is a breach of Section 3(4) with section 3(1) of the Act. However, as decided in **XYZ vs. M/s Penna Cements, M/s India Cements M/s Bharathi Cements M/s Dalmia (Bharat) Cements 2014**, etc. the mere allegation of increasing the prices of a product would not make the transaction anti-competitive

EXCEPTION TO SEC:3: In the Competition Act 2002, some agreements specifically find a mention for being exempted from the purview of being anti competitive in nature even if they are likely to cause an AAEC (appreciable adverse effect on competition- dealt infra) to the competition.

This proviso clearly offers a shield to the agreements which lead to the setting up of joint ventures for the purpose of achieving the larger interests like increased efficiency in various manufacturing processes like production, supply, distribution, storage, acquisition and control. This is with a view to promote the interests of the consumer and for the ultimate benefit of maintaining a healthy market economy at the cost of competition.

Upon similar lines, Section 3(4) (i) protects the intellectual property rights of a person. Indian legal system has certain legislations mentioned under sub clauses (a) to (f) of section 3(4) (i), which provide for intellectual property rights. If an agreement is entered into by a person to protect his intellectual property

rights protected by the provisions of above mentioned legislations, then the competition act, 2002 exempts the agreement to be covered under the purview of section 3(1) as being void for the reason of being anti competitive in nature. Such agreements maybe entered into, for the protection of trademark and copyright infringement. Also, section 3(4)(i) provides for agreements which are entered for export related purposes to be kept out of the purview of section3(1) and 3(2) for being adjudged as anti competitive.

JUST GET TO KNOW!

The most common vertical restraints as per the **European competition law** are:

Single branding: Single branding results from an obligation or incentive which makes the buyer purchase practically all his requirements on a particular market from only one supplier.
Exclusive distribution: In an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale in a particular territory.
Exclusive customer allocation: In an exclusive customer allocation agreement, the supplier agrees to sell his products only to one distributor for resale to a particular class of customer.
Selective distribution: Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors, on the one hand, and the possibilities of resale on the other..
Franchising: 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 or services. In addition to the licence of IPRs, the franchiser usually provides the franchisee during the life of the agreement with commercial or technical assistance.
Exclusive supply: Exclusive supply means that there is only one buyer inside the Community to which the supplier may sell a particular final product.
Tying: Tying exists when the supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier or someone designated by the latter. Recommended and maximum resale prices The practice consists in recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price.

Note they are almost analogous to Indian practice.

The section 3(5) of the Act gives due recognition to the intellectual property rights, which provides that the prohibition against anti – competitive agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the Copyright Act, 1957, the Patents Act, 1970, the Trade Marks Act, 1999, the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000 and the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

In the **FICCI Multiplex case,** the CCI was confronted with a situation wherein parties claimed their rights under sec: 3(5) and wanted to be exempted from the application of the Act. The CCI, however, noted that "intellectual property laws do not have any absolute overriding effect on the competition law. The extent of the non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights.

Further to emphasis the Competition Act specifically states that the contours of anti-competitive restraints will not apply with respect to those horizontal and vertical agreements which impose reasonable conditions to protect or restrain infringement of, the rights granted under intellectual property laws. For instance, in the case of **Shri Ashok Kumar Sharma v. Agni Devices Pvt. Ltd**, it was held that a mere restriction on the use of trademark would not be in violation of Sections 3 or 4 of the Competition Act, 2002.

Further the Competition Act, 2002 does not restrict any person's right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provisions of services for fulfilling export contracts.
Thus any agreement for the purpose of restraining infringement of such Intellectual Property Rights or for imposing reasonable conditions for protecting such rights shall not be subject to the prohibition against anti-competitive agreements.

LAWXPERTSMV. #REVISION NOTES

COMPETITION LAW

AMBIT OF COMPETION ACT 2002:

- Regulates anti-competitive agreements – ex post facto; operational
- Regulates abuse of dominant position – ex post facto; operational
- Regulates combinations – ex ante; operational
- Repeals MRTP, 1969
- Has extra-territorial reach
- Covers both goods and provision of services

COMPETITIVE AGREEMENTS

ORIGIN:

- Indian competition Act, 2002 is greatly influenced by U.S. and U.K. legal systems. '
  - ✓ Indian regulatory arm borrowed from EU.
  - ✓ Anti-Competitive agreements : influenced by Clayton Act, 1914 of U.S. and U.K. legislation.

CONCEPT: Anti-competitive agreements = restricts competition. Therefore Sec. 3 Indian Competition law prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or

control of goods or services which causes or is likely to cause an appreciable adverse effect on competition in India and it shall be **VOID.**

ANTI-COMPETITIVE AGREEMENTS (ACA):

MEANING: agreements those restrict competition are ACA.

DEFINITION OF AGREEMENT: Sec:2(b) – agreement includes (inclusive definition)

i. Arrangement
ii. understanding or
iii. concerted action.

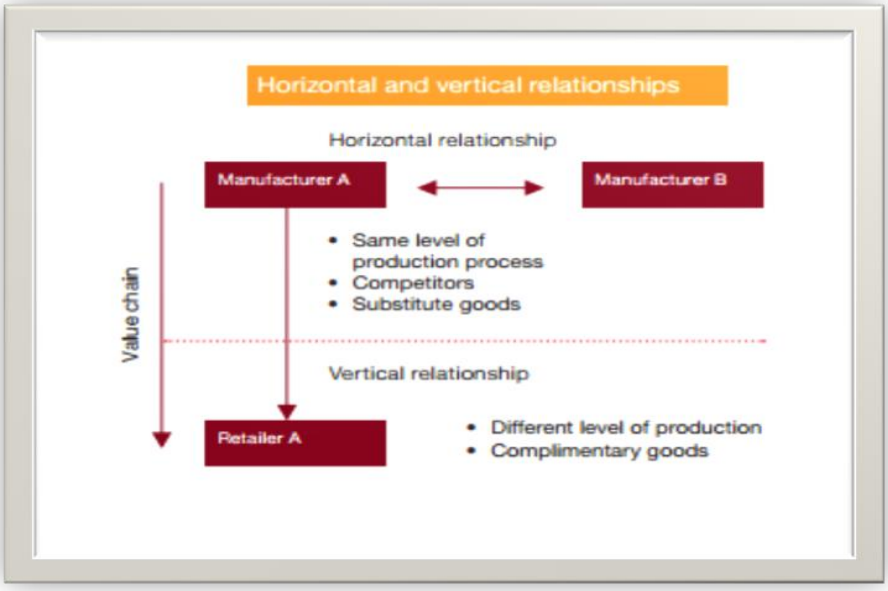
- ✓ Not just formal or writing or justifiable but also informal agreement to fix prices.
- ✓ **Registrar of Restrictive vs W.H Sniith and sons** : traders make their agreements in cellar, where no one can see and ***without writing.***
- ✓ **Neeraj Malhotra vs Deustche Post Bank Home Finance Ltd**- agreement to contain more than one party -to act in arrangement / understanding or concert which is identifiable.

There are two types of agreement: Horizontal agreement and vertical agreement;

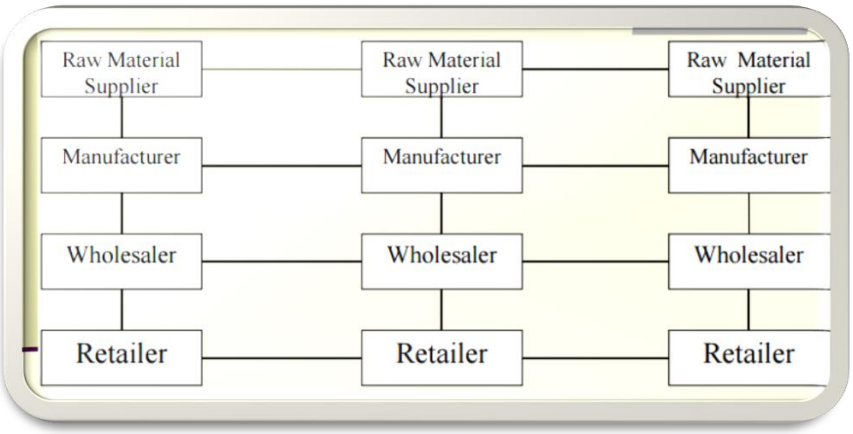
Horizontal Agreements: When rivals or competitors agree to fix prices or share consumer or do both, the agreement termed as cartel. Horizontal agreements: Section 3(3) discusses about a specific class of agreements including cartels which are to be presumed to **be anti competitive.**

Vertical agreements: between producers and suppliers or between producers and distributors. These are referred to as vertical agreements. Vertical agreements too can undermine competition in the market.

DIAGRAM DIFFERENTIATING TWO TYPES OF AGREEMENT:



ALL ROWS ARE HORIZONTAL AGREEMENTS PARTIES AND ALL COLUMNS ARE VERTICAL AGREEMENT PARTIES.



- **Directly or indirectly determine sale or purchase prices;**
- **Limits or control production, supply, markets, technical developments, investments or provision of services;**
- **Share the market or source of production or provision of services by allocation of inter-alia geographical area of market, nature of goods or number of customers or any other similar way;**
- **Directly or indirectly result in bid rigging or collusive bidding.**

Anti-competitive agreements: Any agreement with respect to production, supply, distribution, storage, acquisition or control of goods/provision of services which is anticompetitive is prohibited and void. Such agreements must cause or be likely to cause appreciable adverse effect on competition (AAEC) in a relevant market in India. The relevant market may be a geographical or a products market.

The Act distinguishes between horizontal and vertical agreements.

Horizontal agreements: Agreements between enterprises or persons engaged in trade of identical or similar goods or services are presumed to have AAEC if they:

• Directly or indirectly determine purchase or sale prices

• Limit or control output, technical development, services etc.

• Share or divide markets

• Indulge in rigging or collusive bidding

DETERMINATION OF ANTI COMPETITVE NATURE OF AGREEMENTS:

By application of two rules :

(i) **Rule of reason** : Originated in USA in ***Standard Oil Co. Case.***

Concept: By this rule the court has to analyze situation after the agreement came into force must be ascertained to evaluate the true nature of the agreement, whether it has actually caused any harm to the competition or not. Apart from this, the future probabilities of a negative effect upon the competition, is also to be considered to adjudge the agreement as anti competitive.

Cartels prohibited - Inclusive definition

• Agree to limit, control or attempt to control production, distribution, sale or price

I - ANTI-COMPETITIVE AGREEMENTS

- ❑ Agreement amongst competitors (***horizontal agreement***), including cartels – *presumed* to have *appreciable adverse effect* on competition. Cartels most pernicious violation-subject to *per se* rule
- ❑ Price fixing, sharing of market, limiting production, supply, etc., bid rigging, collusive bidding.
- ❑ Agreement such as between manufacturer and distributor (***vertical agreement***) – subject to *Rule of Reason; burden of poof lies on prosecutor.*
- ❑ Tie-in arrangement, exclusive supply/distribution agreement, refusal to deal, resale price maintenance.
- ❑ Agreement includes arrangement or understanding, oral, or in writing, not necessarily enforceable by law

Tie in arrangements-

- More than one product-tying and tied-both having different markets-condition to purchase
- Full line forcing
- Adverse effects : Entry barriers to other rivals. Denial of access to other sources by buyers, reduced choice of consumers, compulsion to have tied product against wish

DETERMINATION OF ANTI COMPETITVE NATURE OF AGREEMENTS :

Rule of reason:

- ✓ First case: **Standard Oil Co. of New Jersey v. United States** : any restraint on the market or competition under the then applicable Sherman Act would be anti competitive : positions before and after the agreement came into force must be ascertained to evaluate the true nature of the agreement, whether it has actually caused any harm to the competition or not.
- ✓ **TELCO v Registrar of RT Agreement** : pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be. Applicable only to vertical agreements.

Per Se Rule:

- ✓ **First case : Addyston Pipe & Steel Co. v. U.S**. : Bidrigging agreement under cartel : had a direct economic impact and was of such nature that it could not be considered for a partial or limited restraint.
- ✓ Merriam-Webster's legal dictionary is- a rule that considers a particular restraint of trade to be manifestly contrary to competition and so does not require an inquiry into precise harm or purpose for an instance of it to be declared illegal.
- ✓ India law follows this rule with respect to Horizontal agreements under section 3(3) of the Act shall be judged by 'shall be presumed rule' and onus to prove otherwise lies on the defendant.

i.Tie-in agreement; ii) Exclusive supply agreement; iii) Exclusive distribution agreement; iv) Refusal to deal; v) Resale price maintenance, shall be presumed an anti-competitive agreement, if such agreements causes or is likely to cause an appreciable adverse effect on competition in India.

EFFECT OF ACA: Void.

In Haridas export v. All India float gas manufacturers the commission says that It is immaterial in this regard that where the agreement is enterred into by or who are the parties of the said agreement, if that particular agreement has some adverse effect on the Indian market that is enough for considering that agreement as anti competitive.

MEANING OF THE TERM "APPRECIABLE ADVERSE EFFECT ON COMPETITION":

- ✓ AAEC- Not defined. But Acts mentions certain factors

Tata Sky –'set-top box interoperability case'– In this case, the challenge was to the anticompetitive practice of DTH operators in restricting interoperability of set-top-boxes. The CCI was of the opinion that there is no violation of §3 or §4 of the Act.1

Horizontal Agreements: Agreement between rivals or competitors. Most malicious form-cartels.

R.S. Nayak v. A.R. Antulay and Sodhi Transport Co. v. State of Uttar Pradesh, where it held that "*the presumption is not in itself evidence but only makes a prima facie case for the party in whose favour it exists. It is not laying down a rule of conclusive proof.*"

Purpose of horizontal agreements:

- ✓ generate policies regarding production, distribution and price fixation.
- ✓ channel for sharing of information
- ✓ affect prices and quality of products in the market.

Restriction on horizontal agreements: Section 3(3) broadly provides for the restriction of following as being anti competitive in nature = Agreements ; practices ; Decisions and Cartels
If they are of following characteristics:

e) Agreements that directly or indirectly determine purchase or sale prices:

f) Limits or controls production, supply, markets, technical development, investment or provision of services

According to Livingstone - An example of such an agreement is one where there is a clause that the distributor must ensure the selling of 100 cylinders a month. limitation of sales has a similar effect as well as discouraging competition for new entrants.

g) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or the number of customers in the market or any other similar way .

Prof. Whish observes that

- ✓ it diminishes choice;
- ✓ eliminate the need to police the pricing practices of the companies which are parties to the agreement and the
- ✓ need for producers with different costs to agree on appropriate prices.

h) Directly or indirectly results in **bid-rigging or collusive bidding** .

Cartels: agreements form a part of a concerted action by the market players to join hands and get together to a consensus to abide by certain anti competitive practices which affect the market competition negatively

- ✓ limiting output or fixing prices is sufficient condition for a cartel
- ✓ per se bad.
- ✓ includes acts preventing or restraining the trade or competition.

There are typically four types of cartel conducts: price fixing ; market sharing ; output restricting ; bid rigging.

Elements of Cartel:

- ✓ **adverse effect** : U.S v. Griffith, and
- ✓ intention of the parties to the agreement + overt act to give effect to that specific intention #Ashton v. CIR.

In Builders Association of India (hereinafter "the Cement case"), decided in June 2012, the Commission came to the conclusion that a group of cement manufacturers under the umbrella organisation of the Cement Manufacturers Association (hereinafter "CMA") had indulged in cartelisation, in contravention of Section 3(3) of the Act.

Relying heavily on circumstantial evidence, it concluded that market forces alone did not determine price, with prices moving "in the same manner and same direction" pursuant to regular meetings held by members of the CMA. Consequently, the Commission imposed a hefty cumulative fine of Rs. 6,300 crore on the parties.

In stark contrast to this decision, in October 2012, in All India Tyre Dealers' Federation (hereinafter "the Tyre case") the Commission found that since the tyre manufacturing market is highly concentrated and oligopolistic in nature (thereby making it ordinary for each party to know what the other is doing) meetings held by the manufacturers **did not amount to cartelisation under Section 3(3) of the Act.**

Thumb rule : To prove a claim for cartelization. **Price parallelism** is not enough ; it requires "**plus factors**" in addition to just similarity in pricing to be punishable for cartelisation

Soda ash cartel: Alkali Manufacturers Association of India v. American Natural Soda Ash Corporation : 6 producers of soda ash, they were acting independently, after cartel agreement, supplied their produce at very cheap rate causing reason the local producers of different nations. GOI charged a very high rate of anti dumping duty upon this cartel.

Banks Case – 'pre-payment penalty case' : allegation of cartelization and abuse of dominance by banks in charging a pre-payment penalty on home loans. The majority view was that there were **no violations** of either §3 or §4 of the Act.

Bid Rigging and Collusive Bidding: Sec. 3(3) : Any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. It is presumed to have AAEC.

Jupiter Gaming – 'bid-rigging case' : abuse of dominant position by the Government of Goa in prescribing tender conditions for selecting online lottery agents. The CCI, however, found no violation.

ATF cartel: The RIL has filed in ATF Bidding. PSU like IOC, BPCL, HPCL all were engaged in that cartel. RIL wanted to enter into the business of supplying the ATF to the Jet Airways, but for this cartel it failed to do this.

Cartel in Road Transport: . Proper road transportation system is required for better implementation of the socio-economic policies of the country. It also affects the price of the goods. So, the CCI should make appropriate provisions to give a check and balance method to control the anti competitive activities in road transportation system.

Railway cartel: Railway Seats of the compartments. Previously foam was used to make these seats. Now shifted to a new material called recron for making seats. Two vendors of recron found to act as cartel.

Trucking cartel: Truck operators fixed the fare of the truck transportation and restrained the other truck operators to compete with each other regarding the price fixation. The MRTP Commission gave a cease and desist order to some of the truck operator union without penalty.

Vitamin cartel: Companies from Japan, France and Germany entered into a cartel regarding the fixation of the price of the vitamins throughout the world. After 10 years, huge penalty was slapped on all those countries across various jurisdictions but no penalty was imposed by India.

Vertical agreements: Agreements at different stages or different levels of market chain. Section 3(4) Rule of reason is employed to declare them as anti-competitive agreements.

(a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Explanation.—For the purposes of this sub-section,—

Tie –in arrangements : any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods"

WAYS TO TIE A PRODUCT:

(1) Contractual tying ; (2) Technical tying : One product cannot be technically used without another. (3) Tying through "economic coercion.

The basic requirements of Tie-in arrangement to be illegal.

- ✓ Two separate products or services.
- ✓ Agreement asking to buy another product ;
- ✓ seller has sufficient economic power ;
- ✓ must affect a "not insubstantial" amount of commerce.

Courts are nearly unanimous in agreeing that these are the basic requirements of a tying claim.

Testing the legality of tie-in arrangements: The legality of tie-in arrangement is test by application of rule of reason. Under, the rule of reason, courts will use a balancing test, or a "look at all the facts" approach

Another requirement for an illegal tying arrangement, however, requires the courts to examine the degree of market power that the seller has in the various markets

The Kodak Case: No discussion of tying would be complete without mentioning the case of Eastman Kodak Company v. Image Technical Services, Inc.

FACTS : Customers of Kodak equipment could buy the replacement parts themselves and hire the ISOs to service the machines or they could hire the ISOs to provide both the replacement parts and the service at lower cost than Kodak Service. But Kodak prevented it.

ISSUE : In Kodak, the issue was whether Kodak had sufficient economic power in the tying product market (for Kodak parts) to appreciably restrain competition in the tied product market (Kodak service).

COURT'S VIEW: Under Kodak, then, market imperfections -- or "market realities" as the Supreme Court called them -- can provide the necessary economic power in the tying market required for a per se tying violation.

OTHER CASES:

CAUSE TITLE	PRODUCTS TIED IN.	DECISION OF CCI
In Re RP Electronics case	Electronics and their annual maintenance were made as single product.	Held to be tie- in arrangement having AAEC
Chanakya and Sidarthana Gas Company	Gas connection service was tied in with gas stove product.	Tie-in arrangement having AAEC
In Re Rajasthan Bank	Fixed deposit + Locker facility	Tie-in arrangement having AAEC
Amarjeevan Public school case	Uniform + Books + Education	Tie –in arrangement having AAEC
United Radio and TV Company	Stabilizer + TV	Tie-in having AAEC

All the above cases were over ruled in, **In Re TCI case** where the car sale was tied in with AC serive for car,(i.e.,) those who purchase car must compulsorily take AC service. This was held to be tie-in arrangement not having AAEC as it only promoted the quality of the car (product)

EXCLUSIVE SUPPLY AND EXCLUSIVE DISTRIBUTION AGGREEMENT:

Exclusive supply arrangements includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Whereas **distribution agreements** includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods**. They have been defined under the Explanation (b) and (c) to subsection (4) of section 3 of the Competition Act 2002.**

- ✓ **Telco vs RRTA,** exclusive dealership by specialization in goods after –sales services is not anti-competitive.
- ✓ **Airlines case –**Proposed alliance between Jet Airways and Kingfisher. The agreement included code-sharing on both domestic and international flights and joint fuel management with a view to reduce expenses, as well as common ground-handling, cross selling of flight inventories using a common global distribution system platform and cross-utilisation of crew on similar aircraft types were the other key areas of the proposed agreement. The CCI, however, found that "none of these agreements can be said to have either determining the airfares or limiting the supply or allocating the market" and thus no violation of either sec:3 or sec:4 was found to have been established and the matter was closed

REFUSAL TO DEAL AGREEMENT : The section 3 sub-section (4) of the Competition Act defines it as including any agreement which restricts or likely to restrict by any method the persons or classes of persons top whom goods are sold or from whom goods are bought.

Refusal to supply:

- Restriction from seller to the buyer- not to sell to a particular person or enterprise or manufacturer shall not sell except the buyer,
- It is business domain with whom to deal,
- Refusal to supply in case of objectionable conduct by buyer/distributor is not construed as 'refusal to deal'.

Mere non- supply is not refusal to deal : Mere non supply of goods to a dealer does not amount to refusal to deal, unless it is the outcome of non-adherence to some restrictive covenant, e.g. tie-ups sales, area restriction etc.

Aspen Skiing Co vs Aspen Highlands Skiing Corp, that refusal to deal can be abused when access is denied after having been granted in the past.
In **RRTA vs Bata India Ltd** engaged in the manufacturer of leather and rubber canvas footwear, entered into agreements with small – scale manufactures for purchase of footwear to be sold by it under its own brand. The agreements prohibited these manufactures from purchasing raw material and components.. The Commission held that these conditions imposed by Bata is restrictive trade practices and prejudicial to public interest.

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In the **FICCI Multiplex case,** the CCI was confronted with a situation wherein parties claimed their rights under sec: 3(5) and wanted to be exempted from the application of the Act. The CCI, however, noted that "intellectual property laws do not have any absolute overriding effect on the competition law. For instance, in the case of **Shri Ashok Kumar Sharma v. Agni Devices Pvt. Ltd**, it was held that a mere restriction on the use of trademark would not be in violation of Sections 3 or 4 of the Competition Act, 2002.

Further the Competition Act, 2002 does not restrict any person's right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provisions of services for fulfilling export contracts Thus any agreement for the purpose of restraining infringement of such Intellectual Property Rights or for imposing reasonable conditions for protecting such rights shall not be subject to the prohibition against anti-competitive agreements.