



Luthra & Luthra
Law Offices

**ADVANCED PROFESSIONAL PROGRAMME
ON COMPETITION LAW- PART I
FOR OFFICERS OF CCI**

**SESSION: ANTI COMPETITIVE
AGREEMENTS UNDER THE
COMPETITION ACT, 2002**

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Agreement

- Existence of Agreement is must
- Agreement= Offer + Acceptance
- Offer and acceptance may be express or implied
- Agreement is defined very widely.
- **Inclusive definition** – includes any arrangement or understanding or action in concert
- Arrangement suggests some sorts of communication or exchange of views-
- Austin Motor Car Co.,
- General Electric Company of India Ltd.,
- Delhi Automobiles Private Limited, and
- American Tobacco Co. Vs United States

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- Understandin focus on behavioural communication or adoption of a particular conduct by parties- Coates India Private Limited
 - Action in concert-focus on coordination between parties- Kasturi& Sons Limited
 - Includes formal or informal, written or oral agreements
 - Includes agreements not meant to be legally enforced.
 - Understanding-action in concert- arrangement may overlap-Concurrence of Wills is a condition precedent to make 'Agreement'.



Agreement between

- Person and person
- Person and enterprise
- Enterprise and enterprise
- Person and AOP
- AOP and AOP
- Person and association of enterprises
- Associations of enterprises
- AOP and association of enterprises



Basic Concepts...Contd.

Person- does not include Government

Enterprise- Test of sovereign function –N Nagendra Rao Vs State of AP – Enterprise v. Undertaking

Assocition of Enterprises (Trade Association)

Association of persons

Goods- Land and shares before allotment

Services

Consumer



Agreements relating to

- Agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services;

Integration of functions and integration of entities (Acquisition of goods and acquisition of shares/voting

rights/assets/control/merger/amalgamation;

Treatment of Joint Ventures

AAEC is a condition

- that cause or are likely to cause appreciable adverse effects (AAEC) on competition within India are anti-competitive agreements
- AAEC is a condition precedent to prohibit an agreement.

Factors to determine AAEC

- Appreciable means perceptible but not a synonym of substantial
- No de minimus principle in India
- Every restraint in agreement does not restrict competition- Mahindra & Mahindra Limited
- Barrier to new entry
- Foreclosure of market
- Driving out existing competitors
- Benefit to consumer
- Improvement in production
- Promotion of technical development.



- Such agreements are prohibited by law.
- Such agreements are VOID.
- Rationale for prohibition of anti competitive agreements

Other relevant aspects

- Independence of parties-Principal & Agent, Employer and Employee, Holding & Subsidiary agreement, Agreements within Group
- Anti competitive Practice
- Overseas anti-competitive agreement executed overseas but having effect on Indian soil are covered

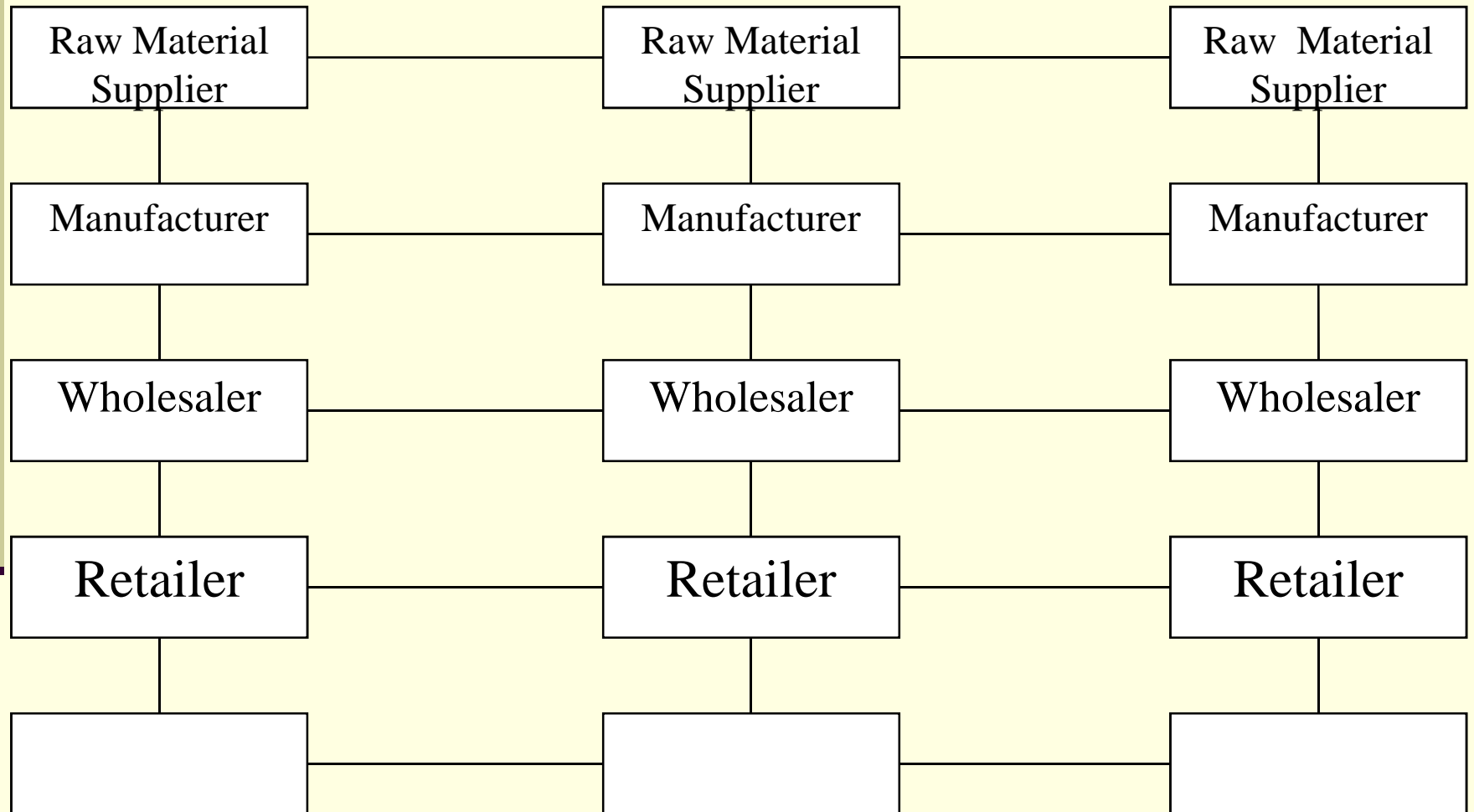


Restraint of trade under the Indian Contract Act, 1872

- Restraint of trade is void except in case of sale of goodwill of a business;
- Judicial Ratio in case of Gujarat Bottling case
- Restraint on trade during the subsistence of agreement
- Restraint on trade post termination of the agreement



Horizontal & Vertical Agreements



Horizontal Agreements (cartels)

- Only those agreements which are entered into between parties engaged in identical or similar goods or provisions of services;
- Decision of Associations
- All horizontal agreements are not cartel
- All cartels are horizontal agreement
- Only horizontal agreements falling in Section 3(3) are presumed to have AAEC
- Agreements falling in 3(3) are not per se illegal



- The aim of cartel is to limit, control the production, distribution, sale or price of, or trade in goods/service
- Ingredients to make cartel are (a) agreement, (b) between specified parties, and © to carry specified aims
- Tyres, cement, steel and aluminium are believed to be sectors infected by 'cartels' globally.
- Cartel is strengthened when cheating is difficult or there is compensation scheme

Role of Trade Associations:

- Significant role but often a platform for cartel
- Two types of associations- when members are in different trade and when members are in same trade
- CII has 380 Associations representing 83000 companies,
- FICCI has 500 chambers with over 3.5 lakhs business units
- Assocham has over 300 Chambers with over 2 lakhs members

Conditions which facilitate cartel

- Few competitors
- High entry/exit barrier
- Similarity of products
- Similar production cost
- High ratio of fixed to variable cost
- Entry takes long time
- Excess capacity
- Inelastic demand
- Fragmented market
- Effective Trade Association
- History of collusion

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- Do' and Don'ts:
 - Prohibited activities
 - Rules governing admission/expulsion
 - Rules governing meetings
 - Rules governing Information exchange
 - Rules governing discipline

Price determining agreement

- Agreements determining price by buyers
- Agreements determining price by sellers
- Price includes discount, rebates, incentives, credit period and limits



Limiting or production

- Agreements limiting or controlling:
 - production
 - supply
 - markets
- Technical development
- investment

Sharing/allocation of market

- Allocation of geographical area of market
- Category of goods or services
- Number of customers
- In any other manner



Bid rigging/collusive bidding

- Types of bid rigging:
 - bid suppression
 - complementary bidding
 - bid rotation
 - sub contracting
- Bid rigging and collusive bidding-distinction
- In bid rigging, it is to be proved that it has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding
- Suspicious behaviour to pre empt bid rigging

Efficiency enhancing JVs

- Efficiency enhancing JVs are not presumed to have AAEC,
- Challenges to identify and quantify efficiency and parties having access to facts
- Total welfare / consumer welfare / total surplus.



Evidence of Cartel

- Direct evidence
- Circumstantial evidence
- Civil offence
- Price Parallism plus
- Preparation against defences

Tools to collect evidence

- Dawn raids
- Good practices to search & seizure
- MOUs necessary in case of international cartels
- Leniency



Vertical Agreements

- Agreements amongst enterprises or persons
- In different levels of production, distribution, storage, supply, sale or price of or trade in goods or provisions of services
- No involvement of Associations
- Different Markets
- Generally in writing
- May be pro competitive
- No presumption of AAEC



Statutory Illustrations of Vertical Agreements

- Tie in arrangements- More than one product-tying and tied-both having different markets-condition to purchase
- Principal to principal-not principal and agent, company and its depot
- 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



Exclusive supply/distributor Agreement

- An agreement restricting the purchaser from acquiring competing products is exclusive supply arrangement;
- An agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market
- The adverse effect is foreclosure of market for certain suppliers as certain distributors are restrained to purchase, reduced choice
- The benefit effect is efficient after sale service, cost of operation can be tamed, greater inter brand competition, the lesser the adverse effect
- TELCO, Mahindra & Mahindra, Spencer & CO.,



Refusal to deal

- Restriction from seller to the buyer- not to sell to a particular person or enterprise or manufacturer shall not sell except the buyer;
- Business domain with whom to deal;
- Refusal to supply in case of objectionable conduct by buyer/distributor

Resale Price Maintenance

- A kind of price fixing
- Such practice can be by manufacturer, distributor or retailer
- Price fixing at same level and price fixing at different level
- RPM – fixed sale price, maximum price, minimum price



CCI's powers in respect of anti-competitive agreement

- Cease & desist order
- Grant interim relief during enquiry
- Declare anti-competitive agreement void.
- May direct modification of the Agreement.
- May impose –
 - upon each producer, seller, traders or service provider included in the Cartel, a penalty upto 3 times of profits for each year of such agreement or 10% of the turnover for each year of such agreement, whichever is higher.
 - Penalty of not more than 10% of the average turnover of the last 3 preceding financial years on parties.
- All remedies except penalty on trade association.



Remedies & Penalties

- Cease & Desist order against enterprises
- Cease & Desist order and other directions against Associations
- Direction to modify the agreement
- Such other directions- Affidavit of compliance
- Any other direction deemed appropriate by the Commission

Penalties

- Penalties:
 - Twin objectives
 - Guidelines
 - Calculation of relevant turnover/profit
 - Duration of contravention
 - Aggravating factors
 - Mitigating factors
 - Officers deemed guilty
 - Leniency only in penalties and not in respect of other remedial measures

Thank You



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