

*IAL (India), WCCG (UK) & IID (India)'s  
INTERNATIONAL CONFERENCE ON  
COMPETITION LAW, NEW DELHI*

**SESSION: VERTICAL AGREEMENTS  
& COMPETITION CONCERNS**

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# Indian Competition Act, 2002

- The trident enforcement/regulatory dimensions are:
  1. **Anti-competitive agreements (ACA);**
  2. **Abuse of dominance(AOD); and**
  3. **Regulation of Combinations.**
- ACA & AOD came into force from 20<sup>th</sup> May, 2009.
- The ‘merger control’ is expected to be enforced shortly,
- *The other two dimensions are :*
  - Rendering of opinion; and**
  - Undertaking competition advocacy**

# Anti competitive agreement

- Agreements qua business,
- Agreement may relate to Integration of function/structure or control of business,
- Business functions relate to production, supply, distribution, storage, acquisition or control of goods or provision of services,
- Agreement that causes or is likely to cause AAEC within India, is prohibited and void
- Restraint of trade prohibited under Indian Contract Act, 1872,
- Repealed MRTP Act, 1969 and the present Act.



# Conditions precedent

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- Existence of agreement – a pre-condition
- Independence of parties- a must. Agreement between:
  - Principal & Agent,
  - Holding & subsidiary, and
  - Member of a ‘group’
- Every restraint in agreement does not restrict competition
- ‘Appreciable’ means ‘perceptible’ but not a synonym of ‘substantial’

# Factors to determine AAEC

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- Creation of barriers to new entrants
- Driving existing competitors out of market
- Foreclosure of competition by hindering entry
- Accrual of benefit to consumers
- Improvement in production or distribution of products
- Promotion of technical, scientific and economic development.

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# Vertical Agreements

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- 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
- Parties operate in different markets
- Generally in writing
- May be pro competitive
- No presumption of AAEC

# CCI's powers & vertical agreements

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- Cease & desist order
- Grant interim relief during enquiry
- Declare anti-competitive agreement void.
- May direct modification of the Agreement.
- May impose penalty of not more than 10% of the average turnover of the last 3 preceding financial years on parties.
- Any other direction- affidavit of compliance etc.

# Statutory Illustrations

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The list is not exhaustive

‘Inclusive’ definition.

## **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

## **Exclusive supply/distributor agreement :**

- restricting the purchaser from acquiring competing products,
- 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 benign effect is efficient after sale service, reduced cost of operation, greater the inter brand competition - the lesser is the adverse effect,
- Supreme Court ratio in case of TELCO, Mahindra & Mahindra, Spencer & CO. cases.



## **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'.



## **Resale Price Maintenance (RPM):**

- 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

# Other forms of vertical agreements

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- Franchise agreement
- Technical transfer & IP licence agreement
- Selective distribution agreement
- Exclusive purchase obligation agreement
- Competitors entering into cross supply/licence

# Need for Guidelines

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- A business has to self assess,
  1. No mechanism for informal advice,
- No mechanism for advice on novel and unresolved question of law,
- No power with CCI to grant exemption
- CCI needs to put in public domain guidelines and cases of potential pitfalls
- Education program would complement

# Need for pragmatic approach

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- Vertical agreements are generally benign unless a party to it enjoys market power,
- Absence of de minimus principle,
- No provision for individual exemption,
- Enquiries increase cost, divert focus and dampen trade,
- Economic assessment – a formidable challenge,
- Minimize inappropriate intervention.

# Thank You



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