**Anti-competitive agreements**

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 control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

Any agreement entered into in contravention of the provisions contained above shall be void. the whole agreement is construed as void if it contains anti-competitive clauses having appreciable adverse effect on competition.

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. **Anti-competitive agreements include:-**

* agreement to limit production and/or supply
* agreement to allocate markets
* agreement to fix price
* bid rigging or collusive bidding
* conditional purchase/ sale (tie-in arrangement)
* exclusive supply / distribution arrangement
* resale price maintenance; and
* refusal to deal.

Thus, 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 Tie-in arrangement, Exclusive supply agreement, Exclusive distribution agreement, Refusal to deal,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.

**“tie-in arrangements”** includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

**“exclusive supply agreement”** 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;

**“resale price maintenance”** includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

**Refusal to deal** – includes any agreement which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

**Bar from entering anti-competitive agreements**

Section 3(1) of the Act provides a general prohibition on the following to enter into agreements which causes or is likely to cause an AAEC in India:

1. Enterprise and enterprise;
2. Enterprise and association of enterprises;
3. Two associations of enterprises;
4. Two persons;
5. Person and an association of persons;
6. Between two association of persons;
7. Person and an enterprise;
8. Person and an association of enterprise;
9. Association of persons and enterprises;
10. Association of persons and association of enterprises

If an agreement is entered between any of the above, it would be void under the Act and while deciding so they will be examined under the rule of reason1 on a case-to-case basis.

**Horizontal Agreements**

Horizontal agreements are arrangements between enterprises at the same stage of the production chain and that is generally between two rivals for either fixing prices or for limiting production or for sharing markets. In all such agreements, there is a presumption in the Act that such agreements cause AAEC. Cartel is also a horizontal agreement. This is generally between producers of goods or providers of services for price-fixing or sharing of market, and is generally regarded as the most pernicious form of anti-competitive agreement.

Section 3(3) provides that an agreement would have AAEC if there is a practice that is carried on, or a decision that has been taken, between any of the parties mentioned above, including cartels, engaged in identical or similar trade of goods or provision of services, that can either –

1. Directly or indirectly determine the purchase or sale prices;
2. Limits or controls production, supply, markets, technical development, investment or provision of services;
3. 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;
4. Directly or indirectly results in bid rigging or collusive bidding (*effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding*).

* Under the Act**horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive.** This is also known as *‘per se’* rule. This implies that if there exists a horizontal agreement under Section 3(3) of the Act, then it will be presumed that such an agreement is anti-competitive and has an appreciable adverse effect on competition

**Vertical Agreements**

Vertical agreements are between enterprises at different stages of the production chain, like an arrangement between the manufacturer and a distributor. The presumptive rule does not apply to vertical agreements. The question whether the vertical agreement is causing AAEC is determined by rule of reason. When rule of reason is employed, both positive as well as negative impact of competition is analyzed. In order to determine whether any agreement is in contravention of section 3(4) read with section 3(1) of the Act, the following five essential ingredients of section 3(4) have to be satisfied:

1. There must be an agreement amongst enterprises or persons;
2. The parties to such agreement must be at different stages or levels of production chain, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services;
3. The agreeing parties must be in different markets;
4. The agreement should cause or should be likely to cause AAEC;
5. The agreement should be of one of the following nature as illustrated in section 3(4) of the Act:  
     
   1. Tie-in arrangement (*includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods*);
   2. Exclusive supply agreement (*includes any agreement restricting in any matter 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*);
   3. Exclusive distribution agreement (*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*);
   4. Refusal to deal (*includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought*);
   5. Resale price maintenance (*includes any agreement to sell goods on condition that the prices to be changed 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 changed*).

* Vertical agreements are determined by using rule of reason.

**Factors to determine Anti competitive agreements:-**

While determining whether an agreement has an AAEC under section 3, the CCI also gives due regard to all or any of the following factors provided under section 19(3) of the Act –

1. Creation of barriers to new entrants in the market;
2. Driving existing competitors out of the market;
3. Foreclosure of competition by hindering entry into the market;
4. Accrual of benefits to consumers;
5. Improvements in production or distribution of goods or provision of services;
6. Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services

**ANTI-COMPETITIVE AGREEMENTS AND IPR EXEMPTION UNDER SECTION 3(5) OF THE ACT**

**Sec- 3(5) envisages that** **nothing contained in Section 3 (prohibiting anti-competitive agreements) shall restrict the right of any person to prevent infringement or imposing of reasonable conditions that may be necessary for protecting his/her intellectual property rights i.e. copyright, trademark, patent, designs and geographical indications.**

In the aforesaid context, CCI states that any ‘reasonable condition’ imposed for protection of IPR would not attract Section 3, however, imposition of ‘unreasonable condition’ to protect IPR would contravene Section 3 of the Act. The CCI provides an illustrative list of practices/agreements which though entered into for protection of IPR may contravene Section 3 of the Act. Such practices/agreements are:

* **Patent pooling-**may be a restrictive practice if pooling firms decide not to grant license to third parties;
* **Tie-in arrangement**– If under the tying arrangement, licensee is required to acquire particular goods solely from the patentee then it may be a restrictive practice;
* Agreement to continue payment of royalty even after the patent has expired;
* Clause restricting competition in R & D;
* Licensee may be subjected to a condition not to challenge the validity of IPR in question.
* Licensor fixes the price at which the licensee should sell.
* A licensee may be coerced by the licensor to take several licenses in intellectual property even though the Licensee may not need all of them.
* Condition imposing quality control on the licensed patented product beyond those necessary.
* Restricting licensee’s right to sell the product of the licensed know-how to persons other than those designated by the licensor.
* Undue restriction on licensee’s business could be anticompetitive.
* Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.
* Condition imposed on the licensee to employ or use staff designated by the licensor.