



**COMPETITION LAW AND ITS  
APPLICATION  
IN INDIA  
WITH SPECIFIC FOCUS ON PUBLIC  
PROCUREMENT**

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# Brief History and Present Status



- The Competition Act, 2002 was passed by Parliament in December, 2002 and received the assent of the President of India on January 13, 2003, thereby becoming law of the land from that date
- The Act establishes the Competition Commission to prevent practices having adverse effect on competition.
- Due to challenge to the validity of the Act, the substantive provisions of the Act were notified w.e.f 20.05.2009 (relating to prohibition of anti-competitive agreements) and w.e.f 01.6.2011 (relating to regulation of combinations)
- CCI is located in New Delhi and is now fully operational.



# Functions of CCI



- **Enforcement functions [Sections 3,4,5 & 6]**
  - Prohibition of Anti - Competitive Agreements (Section 3)
  - Prohibition of Abuse of Dominant Position (Sec 4)
  - Regulation of Combinations (Sections 5 & 6)
  
- **Advisory functions [Sections 49(1), 21]**
  
- **Advocacy functions [Section 49(3)]**
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## Section 3 - Anti-competitive Agreements



### Cartels

- Enterprises/ persons agree to cooperate to limit/ control price, distribution, production, sale etc. (e.g. price agreements, limiting production)

### Bid rigging

- Bidders agree to manipulate the process of bidding or reduce/ eliminate competition for bids (bid for agreed prices/ quantities in procurement of goods/ services)

### Vertical agreements

- Exclusive supply/ distribution agreements, Tie-in arrangements, Refusal to deal etc.



## Section 4 - Abuse of Dominance (AoD)



### What is Dominance?

- Ability of an enterprise to behave independently of the market forces

**OR**

- Strength of an enterprise to affect its competitors or consumers in its favor

### What is abuse of dominance?

- When an enterprise uses its dominant position in the market in an exploitative or exclusionary manner

**Not dominance, but its abuse is prohibited**



## Section 5 & 6 - Regulations of Combinations



- Combination includes: merger and amalgamation and acquisition of control, shares, voting rights or assets
- High thresholds
- Mandatory pre-notification before combination
- CCI must decide in 210 days, else combination deemed approved



# Advisory Functions



- The Central Government/ State Government may, in formulating a policy on competition including review of laws related to competition or any other matter, make a reference to CCI for its opinion on possible effects of such policy on competition [Section 49(1)]
- CCI to give its opinion within sixty days of such reference
- The opinion of CCI *not binding* upon the Government
- The Commission shall give its opinion on a reference made by statutory authority [section 21]



# Advocacy Functions

- CCI is mandated to take suitable measures:
  - to promote competition advocacy
  - to create public awareness
  - to impart training about competition issues
  
- Awareness amongst stakeholders will promote compliance, less intervention
  
- Evolving complex economic law
  
- Focus on Advocacy with Central/State Governments, regulators and statutory authorities to promote pro-competition laws, policies, practices.





## Powers of CCI

For contraventions, CCI may pass following orders:

- Cease and desist order
- Penalty upto 10% of average turnover for last three preceding financial years
- In case of cartels, penalty upto 10% of turnover or three times of profit, whichever is higher.
- Agreements having AAEC *void*
- Modification of agreements
- In case of dominance position-order for division of enterprise
- Power to issue interim orders
- In case of combination-can be approved, approved with modification or refused approval.



# CCI's intervention in various sectors:



## Overview

### Real Estate

*Belaire Owner's Association v. DLF Limited Case No. 19 of 2010* and other such cases  
The Commission found the various clauses in the Flat Buyers Agreement executed by M/s DLF to be unfair and in abuse of dominant position. The following clauses were found to be in contravention of the Act:

- Unilateral changes in agreement and supersession of terms by builder without any right to the allottees
- Builder's right to change the layout plan without consent of allottees
- Discretion of builder to change *inter se* areas for different uses like residential, commercial etc. without even informing allottees



# CCI's intervention in various sectors:



## Overview

- Preferential location charges paid up-front, but when the allottee does not get the location, he only gets the refund/adjustment of amount at the time of last instalment, that too without any interest *etc.*
- Accordingly, the Commission issued cease and desist order, directed modification of terms of agreement and imposed a penalty of Rs. 630 crores upon DLF.



# CCI's intervention in various sectors:



## Overview

### Infrastructure

#### ***Builders Association of India v. Cement Manufacturers' Association & Ors., Case No. 29 of 2010 (the Cement Cartel case) (20.06.2012)***

- The Commission found cement manufacturers in violation of the provisions of the Competition Act, 2002 which deals with anti-competitive agreements including cartels. The order was passed pursuant to investigation carried out by the Director General upon information filed by Builders Association of India. The Commission imposed penalty on 11 cement manufacturers named in the information @0.5 times of their profit for the year 2009-10 and 2010-11. The penalty amount so worked out amounted to more than Rs. Six thousand crores (60 billion). The Commission also imposed penalty on the Cement Manufacturers Association.



# CCI's intervention in various sectors: Overview



- While imposing penalty, the Commission considered the parallel and coordinated behaviour of cement companies on price, dispatch and supplies in the market. The Commission found that the cement companies have not utilised the available capacity so as to reduce supplies and raise prices in times of higher demand.
- The Commission also observed that the act of these cement companies in limiting and controlling supplies in the market and determining prices through an anti-competitive agreement was not only detrimental to the cause of the consumers but also to the whole economy since cement is a crucial input in construction and infrastructure industry vital for economic development of the country.



# CCI's intervention in various sectors: Overview



## Public Procurement

- The Commission in a series of cases dealt with cases of cartelization/ bid rigging by the suppliers in the matter of procurement of goods and services by the Government or its departments *etc.*
- The Commission issued cease and desist orders apart from imposing penalties upon such suppliers/ vendors.



# Focus Topic – Public Procurement



## What is Public Procurement?

- Public procurement is purchase of goods and services by Government and its various entities/ departments
- A key economic activity of governments Public procurement is purchase of goods and services by Government and its various entities/ departments
- A key economic activity of governments



# Public Procurement v. Private Procurement



- Public procurement is subject to transparency requirements (legislation/ administrative regulations /procedures *etc.*) to avoid abuse of discretion
- Its outcome is, however, sometimes, influenced by collusion as often procurement mechanism ( including tender design) itself may facilitate anti-competitive practices
- Whereas Private purchaser can choose his purchasing strategy flexibly, public sector has limited options to respond dynamically to threat of collusion





# Competition issues in Public Procurement



- Cartelization/collusive bidding/bid-rigging
- Restricting entry through entry barriers
- Abuse of dominance
- Competitive neutrality



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## Competitive bidding/ Collusive bidding



- Competitive bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions
- This objective may be negated if the prospective bidders collude or act in concert
- Such collusive bidding/ bid-rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive



## What is bid rigging/collusive bidding ?

- Bidders agree among themselves to eliminate competition in the procurement process so as to raise prices and deny fair price to procurer
- It is a type of cartel, where contract is pre-determined to one party even though several other parties also present a bid



# Common forms of Bid Rigging

- Cover bidding
- Bid suppression
- Bid rotation
- Market allocation



# Indicators of Bid Rigging



- Small number of companies
- Little or no entry
- Market conditions
- Industry associations
- Repetitive bidding
- Identical or simple products or services
- Few if any substitutes
- Little or no technological change



# Case Studies



## **In re: LPG cylinder manufacturers, Suo Moto Case No. 03 of 2011**

- The Commission initiated *suo moto* proceedings against LPG cylinder manufactures who were found to be involved in bid rigging in supplying LPG cylinders to M/s Indian Oil Corporation Ltd. pursuant to a tender floated by it. It was noted by the Commission that the identical price quotations submitted by the opposite parties therein pursuant to the impugned tender were actuated by mutual understanding/ arrangements.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 7% of the average turnover of the company.



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## Case Studies contd.

### **A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. & Ors., Case No. 43 of 2010**

- The Commission examined *inter alia* allegations of bid rigging by the bidders in the tender floated by Hospitals Services Consultancy Corporation for supply, installation, testing and commissioning of Modular Operation Theatre and Medical Gases Manifold System to Sports Injury Centre, Safdarjung Hospital, New Delhi.
- The Commission found commonality of mistakes in the tender forms by the bidders as indicative of collusion amongst them to manipulate the process of bidding.
- The Commission imposed a penalty upon each of the contravening party @ 5% of the average turnover of the company.
- However, COMPAT vide its order dated 25.02.2013 passed in Appeal No. 93 of 2012 after considering the aggravating and mitigating factors reduced the penalty to 3% of the average turnover.





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# Case Studies contd.

## **In re: Aluminium Phosphide Tablets Manufacturers, Suo Motu Case No. 02 of 2011**

- The Commission examined the allegation of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets required for preservation of central pool food grains by Food Corporation of India. In this case, the Commission *inter alia* noted that the identical bid price is not possible unless there is some sort of prior understanding.
- The Commission found the collective action of identical bids, common entry in the premises of FCI before submission of bids as indicative of 'plus' factors is support of existence of an understanding among the parties.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 9% of the average turnover of the company.



# Case Studies contd.



## **Coal India Limited v. GOCL Hyderabad & Ors., Case No. 06 of 2010**

- An information was filed by M/s Coal India Ltd. against explosive manufacturers/ suppliers in India along with their associations, for their alleged anti-competitive acts.
- In this case, the Commission found the acts and conduct by the opposite parties therein of boycott of e-reverse auction together with their past conduct of quoting identical rates and controlling the supply of explosives as sufficient to establish that the same was done with a view to manipulate the process of bidding in violation of section 3(3)(d) of the Act.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 3% of the average turnover of the company.
- However, COMPAT *vide* its common order dated 18.04.2013 passed in Appeal No. 82 of 2012 and other connected appeals after considering the aggravating and mitigating factors reduced the penalty to the extent of total of 10% penalty imposed by the Commission.



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## Case Studies contd.

**Ref. Case filed by by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v. M/s Orissa Concrete and Allied Industries Ltd. & Ors., Ref. Case No. 05 of 2011**

- In this case, the reference was filed under section 19(1)(b) of the Competition Act, 2002 by Railway against the vendors alleging *inter alia* contravention of the provisions of section 3 of the Act in the matter of procurement of Anti-Theft Elastic Rail Clips with Circlips from RDSO approved firms.
- The Commission held that in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.



## Case Studies contd.



- From a number of coincidences and indicia (identical rates, division of quantity, similar handwriting, format of covering letter, tender fee payment, past conduct *etc.*), the Commission held that the opposite party bidders entered into an agreement to directly or indirectly determine the prices as also to rig the bid in question.
- The Commission issued a cease and desist order against the contravening parties.
- As regards penalty under section 27 of the Act, the Commission noted that there were circumstances in this case which required the issue of penalty to be looked into somewhat differently. The facts as projected in the present reference revealed a complete lack of awareness on the part of the opposite parties which also happened to be small and micro enterprises. Resultantly, no penalty was imposed upon them.



# Advisory/ Advocacy Measures

- Competition Audit/ Impact Assessment by Central/State Governments of procurement processes, for which CCI could assist.
- Reference to CCI for violations of Competition Law
- Periodic awareness and training of procurement officials through Central/State Government initiatives, assisted by CCI
- Close coordination between CCI and Central/State Government



# THANK YOU