



The Quarterly Newsletter of Competition Commission of India (CCI)

# Fair Play

PROMOTING AND SUSTAINING COMPETITION IN MARKETS

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**In Focus: Public Procurement and Competitions Concerns**

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## FROM THE DESK OF THE CHAIRPERSON

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Let me begin by wishing all stakeholders and readers a happy new year. In the Commission, we have resolved to do our bit to bring some additional cheer to all consumers in 2013.

I am happy to share my thoughts with you in the third issue of 'Fair Play', which brings to you the latest initiatives of the Commission and developments in the field of competition law enforcement and policy. This issue focuses on the area of 'public procurement and competition concerns'.

Public procurement is an important dimension of any economy by virtue of its substantial share in the GDP. This is true for India also. Public procurement is a contentious issue vis-à-vis application of competition law due to a number of factors. However, it should be noted that the Competition Act does not make a distinction between a public and private enterprise. As such, public enterprises, which are generally the big procurers, are subject to competition assessment.

On account of the magnitude and the source of the funds involved, it has been held by the Supreme Court in a number of cases, that the Government does not have unrestricted choice in the matter and that discretion has to be exercised in a rational and reasonable manner. Further, procurement is generally to discharge the social obligations cast upon the public entities. With this in mind, it becomes important to increase competition in public procurement that could also incidentally help in reducing fiscal and revenue deficit of the Government.

Government, as a procurer, has substantial 'buyer power'. This must be used for the benefit of the public at large and not to the detriment of the competition in markets. The procurement agencies have to be alive to market information and optimise the bidders to ensure healthy competition. In this regard, procurement officials need to be aware of the technical specifications, tender process and ensure evaluation of bidding process so as to have a competition compliant public procurement.

I may also mention that the Public Procurement Bill is under consideration, which aims to provide for a competition compliant procurement system. However, even before that becomes law, the existing procedures need to be streamlined from competition perspective. Procurement policies should be evaluated to ensure that they do not provide opportunities for collusion, do not create entry barriers, and ensure optimum utilisation of public funds. This aspect has been discussed in detail in the main article.

With a view to sensitising the public sector officials on the issue of procurement and competition concerns, the Commission has been active in engaging them through advocacy seminars. In pursuance, a conference for financial advisers and key procurement officials of various ministries of Central Government was held during this quarter.

As audit department plays an important role in scrutinising Government expenditure including that on procurement, we thought it necessary to sensitise audit officers about anti-competitive practices in public procurement and competition law provisions to tackle the same. We also organised a conference for senior officers of the Comptroller & Auditor General (CAG) of India on the theme 'Audit of Public Procurement Transactions & Competition Law'.

I hope you will find this issue of 'Fair Play' useful and will continue to give us the benefit of your comments and suggestions.

A handwritten signature in black ink, which appears to read 'Ashok Chawla'. The signature is written in a cursive style and is positioned above a horizontal line.

Ashok Chawla

## Public Procurement and Competition Concerns



Public procurement is the act of purchase of goods and services by a public sector entity for achieving certain identified objectives. It is a vital function of Governments world over accounting for about 15-20 per cent of GDP. India is no exception. Public procurement in India is an important means for not only meeting day-to-day functional needs, but also for fulfilling socio-economic objectives and promoting economic growth. Procurement is carried out by various ministries, departments,

municipalities and other local bodies, statutory corporations and public undertakings both at the Centre and State levels in India. It constitutes around 25-30 per cent of GDP. Key departments of the Government such as defence, railways and telecommunications spend about 50 per cent of their budget on procurement.

As public resources are limited, the primary goal of public procurement policy is to achieve 'value for money', i.e. to procure best goods and services at the lowest price.

This is sought to be achieved through an open and non-discriminatory competitive bidding. Public sector, being a large purchaser of goods and services, can influence the overall resource allocation, competitiveness and economic efficiency in the economy. It is, therefore, important that the procurement process is not distorted by practices such as collusion, bid rigging, fraud and corruption.

## Competition Concerns in Public Procurement

Competition concerns arising from public procurement are largely the same as in any ordinary market such as collusive agreements between bidders, abuse of dominance, and creation of entry barriers. Competition concerns in public procurement can be seen from the two perspectives: a) supplier's side and b) procurer's side.

### Competition concerns on supplier's side

Collusive bidding or bid rigging is a kind of fraud, where bidders agree to eliminate competition and fix prices in the procurement process. This contravenes the very purpose of inviting tenders. Bid rigging can be achieved under alternate terms of agreements between the firms and includes mechanisms to distribute additional profits due to higher contracted price among the conspirators. It is facilitated by faulty bidding procedures and tender designs. Bid rigging is a highly pernicious form of collusive price-fixing behaviour and is universally, regarded as the worst kind of 'hard-core' cartel. Bid rigging can cause serious economic harm. It increases prices artificially and lowers quality, leading to loss of taxpayers' money. In addition, inefficient procurements have a detrimental impact on the quality of key public infrastructure and services and hurt the interests of the poor largely relying on public provision. In India, many Comptroller and Auditor General (CAG) of India audit reports and studies have suggested wide-scale prevalence of cartelisation and bid rigging in public procurement such as by railways.

Dominant firms in public procurement markets may use their incumbent power to keep

away any new entrants into the market. This may usually be done by indulging in predatory pricing, i.e. selling a product or service at a very low price (below cost) in order to drive competitors out of the market, or by creating barriers to entry for potential new competitors by colluding with the procurement officials.

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### Competition concerns on the procurer's side

Often, number of suppliers may be limited by the public authority by its own rules, which may create entry barriers, limit its choice and bring in anti-competitive impact. Some examples are restrictive pre-qualification criteria, complex process of registration of suppliers, limited approved vendors, excessively tedious process for participation and not laying technical specification in generic terms. These rules although seemingly designed for getting best value for money often result in anti-competitive outcomes and may have detrimental impact on market structure in the long run.

Competitive neutrality i.e. level playing field between public entities and private players may sometimes be lacking in public procurement markets, which may tend to be distorted due to preference policy for public suppliers in the procurement. For example, many state owned enterprises (SOEs) may procure from another SOE without

following the normal tendering process or give them a price preference in the tendering. This preferential treatment to one another directly limits the ability of other suppliers to compete. Similarly, policy to protect small and medium enterprises and giving them preference in public procurement may create entry barriers for other suppliers.

## Public Procurement and Competition Law

All over the world, bid rigging is treated with severity in the law. In many countries such as US, bid rigging is a criminal offence. Competition enforcement against bid rigging has promoted fair and free competition in public procurement and has saved substantial public resources in many countries through significant reduction in prices.

In India, Section 3 of the Competition Act, 2002 identifies bid rigging / collusive bidding as one of the horizontal agreements that could adversely impact competition in the concerned market and hence, prohibits it. The Commission can impose severe

**In India, the Competition Act, 2002 prohibits bid rigging/collusive bidding and the Commission can impose severe penalties on the colluding bidders.**

penalties, which may amount up to 10 per cent of average turnover for last three preceding financial years or three times of its profit for each year of continuance of such agreement in case of cartels

(whichever is higher). Similarly, Section 4 deals with abuse of dominance and prohibits unfair or discriminatory conditions/price in purchase/sale or practices resulting in denial of market access.

## CCI as a Change Agent

Like competition authorities worldwide, CCI is playing a two-fold role in public procurement: a) enforcement to penalise and deter anti-competitive practices; and b) advocacy to sensitise ministries, departments and SOEs to sensitise about detection of bid rigging and ushering competition in the market through better tender designs and bidding procedures.

Strict enforcement of competition law and imposition of heavy penalties is expected to deter suppliers to collude or indulge in other anti-competitive practices. The Commission initiated *suo motu* action against the manufacturers of LPG cylinders (*In Re: LPG Manufacturers*) for having manipulated the bids by quoting identical rates in groups. The Commission found that manufacturers had indulged in bid rigging and imposed penalty aggregating to Rs. 165.59 crore. Similarly, in *suo motu* case (*In Re: Aluminium Phosphide Tablets Manufacturers*), the Commission found the companies guilty of bid rigging and imposed a total penalty of Rs. 317.91 crore. In *Coal India Limited (CIL) against Gulf Oil Corporation Ltd. (GOCL) and others*, finding the suppliers guilty of bid rigging, the Commission imposed penalty aggregating to Rs. 58 crore. Imposition of large penalties is a clear message to the suppliers in public procurement that colluding in any form will not be tolerated.

Both monopoly (supplier side) and monopsony (procurer side) abuse as a dominant entity under Section

4 have come for consideration of the Commission in several cases such as *Jupiter Gaming Solutions Private Limited vs. Government of Goa & others*, *Explosive Manufacturers Welfare Association vs. Coal India Limited and its Officers*, *Pankaj Gas Cylinders Ltd. vs. Indian Oil Corporation Ltd.*, *Pandrol Rahee Technologies (Pvt.) Ltd., Kolkata vs. Delhi Metro Rail Corporation Ltd. & others*, *Quoprro Global Services vs. Consular Passport & Visa Division, M.E.A. and others*. In these cases, various issues regarding unfair procurement conditions resulting in denial of market access by the procurer came before the Commission. Although, many cases were closed at the *prima facie* stage for the reason that the Commission recognised the rights and choice of procurer, these cases indicate CCI's role in ensuring competitive procurement.

On the advocacy side, the Commission organises various events to bring awareness among government departments, agencies and SOEs about benefits of competitive procurement, detection of bid rigging and the need to report it to CCI. The financial advisers and key government officers handling the procurement aspects are advised to encourage adoption of competitive practices in public procurement and framing of competitive coherent policies. Procurers are also sensitised about how competitive public procurement can help to save resources and reduce fiscal deficit.

## International Experience

International experience indicates substantial gains from the promotion of competition in public procurement. As per the findings of an OECD survey, savings to public treasuries between 17 per cent and

43 per cent have been achieved in some developing countries through the implementation of competitive public procurement regimes. Another study indicates cost savings of between € 5 billion to €

**International experience indicates substantial gains from the promotion of competition in public procurement.**

25 billion in EU during 1993 and 2002 from increased competition. In Russia, as a result of reform in the field of public procurement, an amount of US\$ 7 billion was saved in 2008. In Japan, promoting fair and free competition in public procurement markets has reduced contract prices by nearly 20 per cent in several cases as a result of restoring competition. Similarly, in Mexico, competitive procurement has saved US\$ 3 billion over three years. In Brazil, promoting competition in a Hydroelectric Plant Concession led to total estimated savings of around US\$ 9 billion over 30 years of the concession agreement.

## Competitive Public Procurement Policies

In view of the huge public expenditure on procurement, achievement of a meagre 5 per cent decline in procurement prices by infusing competition in public procurement has potential of saving huge amount of public resources. This would help in avoiding wastage of public money and curbing fiscal deficit. In addition, this will contribute to better allocation of resources towards development needs apart from improving society's access to

good quality public goods and services. This indicates social welfare potential of competition reforms of public procurement in India. Ensuring effective functioning of public procurement markets is, therefore, part of good governance and requires promotion of effective competition among suppliers, including preventing collusion among potential bidders.

## Designing Competitive Public Procurement

The outcome of public procurement procedures strongly depends on the level of competition for public contracts. Design of competitive public procurement requires:

- Suitable regulatory framework
- Appropriate tender design/bidding procedures
- Training of public procurement agencies

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Regulatory framework can play a very important role in deciding the dynamics of competition in the markets. In the conference organised by CCI in November, 2010, Central Vigilance Commission (CVC) pointed out, "a major problem expressed by the procurement officials is the confusion created by the existence of multiple procurement guidelines

and procedures issued by multiple agencies". Regulatory framework in public procurement should not pose unnecessary regulatory burden or create entry barriers and needs to be designed accordingly. Proposed Public Procurement Bill under the consideration of the Government is a welcome step in this direction. The Commission has given its views on competition dimension of the Bill.

Procurement mechanisms adopted in most government departments focus on accountability and transparency, which may facilitate collusion among bidders. Further, formal rules that govern procurement, the way in which a tender is carried out and the design of the tender itself can all act to hinder competition. The tender process needs to be designed to maximise the potential participation of genuinely competing bidders. While auction design is not 'one size fits all', risk of collusion can be reduced when procurement agency designs tenders with three objectives: a) reducing barriers to entry and increasing bidders' participation; b) reducing transparency and the flow of competitively sensitive information; and c) reducing frequency of procurement opportunities.

Procurement officials have very important role to play both in designing tender documents to allow competition by removing entry barriers as well as in detection of bid rigging, being best placed to monitor bidding behavior. World Bank, OECD etc. have developed frameworks including checklists to guide policy makers in fighting bid rigging in public procurement as well as improving tender design to promote competition in bidding. Training programmes for public procurement officials using these tools can significantly contribute to

making public procurement more competitive.

## Future Vision of the Commission

The Commission will continue to play a pro-active role both as an enforcer to eliminate anti-competitive practices in public procurement in India and as an advocate in promoting competition friendly procurement policies.

However, CCI alone cannot tackle this issue unless it gets support from procurement agencies. The procurement agencies have to design competition friendly procurement as well as ensure evaluation of bidding processes so as to have a competition compliant public procurement. Working together, we can help maintain a competitive marketplace. Further, corruption in public procurement leads to distortion of competition as it allows allocation of the contract to a firm which was not the bidder with the lowest price. Thus, the fight against corruption and anti-competitive practices is complementary. Therefore, long term development of competitive public procurement markets requires close cooperation amongst various stakeholders such as the Department of Expenditure, CVC, CAG, CCI, Directorate General of Supplies and Disposals, and large procurers like defence and railways.

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# SECTION 3 & 4 ORDERS

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## No Evidence of Cartelisation in Tyre Industry

Indian tyre industry manufactures all categories of tyres and most of the domestic demand is met locally. However, along with the remarkable growth in previous years, the tyre industry witnessed allegations of cartelisation and was under investigation by India's erstwhile competition watchdog, Monopolies and Restrictive Trade Practices (MRTP) Commission. The matter was later transferred to CCI. CCI found that allegations of cartelisation levelled against tyre manufacturers were not established.

In the year 2007, a complaint was filed by the All India Tyre Dealers' Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded to the MRTP Commission. MRTP Commission issued notices to leading tyre makers including JK Tyres, Ceat Tyres, Goodyear India, MRF Tyres and Apollo Tyres accusing them of indulging in price-fixing cartelisation. Following the repeal of the MRTP Act, 1969, the case was transferred to CCI under Section 66(6) of the Competition Act, 2002. The AITDF alleged that the major tyre manufacturers were indulging in anti-competitive activities, resorting to malpractices such as price-rigging and strangulation of production and supplies and usurping the excise duty reduction against the interests of tyre users. It was also alleged that the tyre market had been reeling under the exploitative behaviour of these handful of domestic tyre majors.

CCI observed that the five

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domestic tyre companies have consistently accounted for around 95 per cent of the market share of the total production, implying a very high concentration in the industry. Further, tyre industry in India is oligopolistic in nature with high degree of interdependence amongst the firms. In such an oligopolistic market, it is more likely that each player is aware of the actions of the other and influences each other's decisions. As a result of this, each firm in such a market takes into account the likely reactions of other firms, while making independent decisions particularly regarding



price and output. High concentration may provide a structural reasoning for collusive action resulting in parallelism (price or output). It is, however, very important to differentiate between 'rational' conscious parallelism arising out of the interdependence of the firms' strategic choices and parallelism stemming from purely concerted action. Thus, inferring of cartel requires further evidence. CCI, therefore, held that mere price parallelism is not sufficient to prove a cartel as there are other reasons that can explain the price parallelism.

CCI held that, after taking into consideration the act and conduct of the tyre companies and Automotive Tyre Manufacturers Association (ATMA), the industry displays some characteristics of a cartel on a superficial basis. However, there has been no substantive evidence of the existence of a cartel. As a tradable product, the industry has always been open to



competitive threat from imports. CCI held that the available evidence does not give enough proof that tyre companies/ATMA acting together have limited and controlled the production and price of tyres in the market in India. The Commission also observed "there are some factors which may be conducive to cartelization but they may be

diluted due to other factors. The fact that market concentration is very high with entry barriers and the product is homogenous which support cartel formation, but high bargaining powers of OEMs due to the volumes, options to replacement consumer to retread, increasing radialization, imports effectively being cheaper even in the brief period of anti dumping

duty go against sustaining a cartel structure".

Therefore, CCI held that there is not sufficient evidence to hold violation of the provisions of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Competition Act, 2002 by the tyre companies Apollo, MRF, JK Tyre, Birla and Ceat as well as ATMA.

## Commission Rejects Allegation of Abuse of Dominance by Yash Raj Films



The Commission rejected actor-producer Ajay Devgn's allegation of abuse of dominant position by Yash Raj Films (YRF) and held that there was no violation of Competition Act in the case.

Ajay Devgn Films Pvt Ltd (ADF) had moved the Commission alleging that YRF was abusing its dominant position by asking exhibitors to dedicate more screens to its upcoming release, Shahrukh Khan-starrer 'Jab Tak Hai Jaan', affecting ADF's film 'Son of Sardaar'. Both the films were to be released on same day. ADF's complaint was against six parties: Yash Raj Films, Yash Raj PP Associates, Yash Raj Puri & Co, Yash Raj Pal Film Distributors (Bangalore), Yash Raj Vandana Film Distributors and Yash Raj Kushgara Arts.

In the order, CCI observed, "The act of booking theatres by a distributor for its two films simultaneously when the theatre owners have the liberty either to agree or not to agree is not a restraint on the freedom of business of theatre owners. The theatre owners can wait for other films and can refuse to book their theatres simultaneously for two films. Even otherwise, the non-

significant position held by the single screen theatres does not cause any adverse effect on the competition. Even otherwise, the market cannot be restricted to any particular period like Eid or Diwali and the market has to be considered a market available throughout the year". CCI, while issuing restraint orders, had to keep in mind the overall exhibition market and not a particular period of the market. No enterprise can be considered dominant on the basis of just big name. Therefore, the claim of ADF that opposite parties were dominant players in the relevant market of 'film industry in India' was not accepted.

ADF filed appeal in the Competition Appellate Tribunal (COMPAT) against the order of CCI. The COMPAT also refused to stay the YRF's tie-up with single screen theatres across the country for the release of its film 'Jab Tak Hai Jaan'. The COMPAT said, "huge economic interests are at stake for both the parties' films and there could be irreparable loss, if the release is stayed". The Tribunal noted that "it would not be proper on our part to freeze the agreements" between YRF and the single screen film exhibitors.

# SECTION 5 & 6 ORDERS

## CCI Approved Acquisition of the Pantaloons Format Business by Aditya Birla Group

Indian retail industry has experienced significant growth in the last few years. The sector is witnessing increasing number of strategic alliances. CCI vigilantly assesses all such alliances to curb any act, which may cause an adverse impact on competition in markets.

Aditya Birla Nuvo Limited (ABNL), Peter England Fashions and Retail Limited (PEFRL), Indigold Trade and Services Limited (ITSL) and Pantaloon Retail (India) Limited (PRIL) filed a notice under Section 6(2) of the Competition Act, 2002 regarding the proposed acquisition of the Pantaloons Format Business (PFB) of PRIL.

ABNL is the ultimate parent company of PEFRL and has presence across various sectors including retail fashion & lifestyle, financial services, telecommunications, IT-ITeS etc. ABNL, through its division, Madura Fashion & Lifestyle, manufactures and sells apparel, footwear and accessories, under various brands such as Louis Philippe, Van Heusen, Allen Solly, Peter England etc. It has 895 exclusive brand outlets and more than 1250 stores and multi-brand outlets.

PRIL is present in the businesses of retailing fashion & lifestyle, financial services etc. It operates its retail business under the names - Pantaloons, Big Bazaar, Home Town, Food Bazaar, Central, Brand Factory, eZone etc. PFB is engaged in retail of apparel, footwear and

accessories under the brand names Pantaloons Megastores and Pantaloons Factory Outlet. PFB is proposed to be demerged from PRIL, on a going concern basis as a part of the proposed combination, pursuant to the scheme of arrangement under Sections 391 to 394 and other applicable provisions of the Companies Act, 1956.

PEFRL had proposed to acquire PFB to expand the variety of its offerings in the businesses of apparel, footwear and accessories and to complement its existing portfolio, which largely comprises of men's wear.

CCI assessed the pricing range, in which majority of sales of ABNL and PRIL is taking place i.e. shirts, trousers, T-shirts in men's wear and

T-shirts, tops, shirts in women's wear. CCI observed that the concentration of sales of both these organisations are in different price ranges. Moreover, ABNL proposed to acquire only a few of the many brands offered by PRIL in the PFB and, therefore, the combined market share in this category post-combination was found to be small. CCI also found that the business model of ABNL and PRIL appears to focus on and derive maximum turnover from different segments of the apparel, footwear and accessories business in India.

The Commission concluded that the proposed acquisition of PFB by ABG would not give rise to appreciable adverse effect on competition in India and approved it under Section 31(1) of the Act.

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## Non-Compete Clause in Combinations has to be Reasonable

Orchid Chemicals and Pharmaceuticals Limited (Orchid) and Hospira Healthcare India Private Limited (Hospira) filed a notice under Section 6(2) of the Competition Act, 2002 pursuant to the execution of a Business Transfer Agreement (BTA).

Orchid, a 100 per cent Export Oriented Unit (EOU), is engaged in the manufacturing of Active Pharmaceutical Ingredients (APIs) and oral formulations in Cephalosporin, Penem (including Carbapenem), Penicillin and NPNC (Non-Penicillin and Non-Cephalosporin) verticals. Hospira, also a 100 per cent EOU, is engaged in the business of manufacture and export of various injectable formulations in

Cephalosporin, Penicillin and Penem verticals.

Under the proposed combination, Orchid has agreed to sell its Betalactum (Penems including Carbapenems and Penicillins) API business, manufacturing facilities for the said API business and the NPNC API manufacturing facility together with the associated process R&D facility in Chennai to Hospira.

CCI observed that both Hospira and Orchid sell only a few similar injectable formulations in Carbapenem, Penicillin and Cephalosporin verticals. However, these products manufactured by Hospira, except Meropenem, are exported and sold in the regulated markets outside India. The value of

the domestic sales of Meropenem by Orchid and Hospira is also negligible. Therefore, the horizontal overlap between the products offered by Orchid and Hospira in the domestic market in India is insignificant. CCI also noted that Hospira is the primary customer of Orchid in respect of transferred business and the value of sales from this business of Orchid to other customers in India is negligible. Orchid has a negligible presence in the domestic market of Penems including Carbapenems, Penicillin and NPNC APIs in India. Therefore, the resulting vertical integration by Hospira in the manufacture of injectable formulations is not likely to result in foreclosure in any domestic market.



Further, CCI noted that the BTA contains a non-compete clause, which stipulates that Orchid and its promoter cannot undertake certain business activities pertaining to the transferred business, for a period of eight years and five years respectively. The said non-compete obligation also restricts research, development and testing of Penem (including Carbapenem) and Penicillin APIs for injectable formulations. The Commission expressed its opinion that non-compete obligations, if deemed necessary to be incorporated, should be reasonable, particularly in respect of (a) the duration over which such restraint is enforceable; and (b) the business activities, geographical areas and person(s) subject to such restraint, so as to ensure that such obligations do not result in an appreciable adverse effect on competition. The parties to the combination were accordingly required to provide justification regarding the duration of the non-compete obligation and restricting the said activities. In

**Non-compete obligations, if deemed necessary to be incorporated, should be reasonable, particularly in respect of (a) the duration over which such restraint is enforceable; and (b) the business activities, geographical areas and person(s) subject to such restraint, so as to ensure that such obligations do not result in an appreciable adverse effect on competition.**

response, the parties offered the following modifications under the provisions of Regulation 19 (2) of the Combination Regulations:

- (a) To limit the duration of non-compete obligation to four years in relation to domestic market in India; and
- (b) To provide in the BTA that Orchid shall be allowed to conduct research, development and testing on such new molecules, which would result in the development of new Penem (including Carbapenem) and Penicillin APIs for injectable formulations, which are currently not existent worldwide.

The Commission accepted the modifications offered by the parties and approved the proposed combination under Section 31(1) of the Act. The Commission also directed the parties to make necessary amendments in the BTA to incorporate the said modifications.

# INVESTIGATION INITIATED

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## Alleged Abuse of Dominant Position by Vertical Agreement between the Hospital and Cord Stem Cell Bank Service Provider



Stem cell therapy has revolutionised the practice of regenerative medicine. Given its commercial viability, competitive concerns are emerging in the business model of cord stem cell banking in India. There are companies like LifeCell, Cryo-Cell etc., which provide various services relating to collection and preservation of the cord blood and cord tissue.

CCI received information against Dr. L.H. Hiranandani Hospital, Mumbai. The informant stated that while availing maternity services of the hospital, he was not allowed to avail LifeCell's 'umbilical cord stem cell banking services'. The said hospital, instead, insisted to have the services from Cryobanks, with which the hospital had an exclusive tie-up. An allegation of

tie-in arrangement as well as abuse of dominant position was made by the informant.

After considering the matter, CCI found that the patients were forced to take services of Cryobanks, if they wanted to preserve the stem cells of their new born babies. The consumers were left with no other choice for availing the stem cell services, while hospitalised in the said hospital. *Prima facie*, the agreement between the hospital and Cryobanks was found to be exclusive in nature and in violation of Section 3(4), requiring further investigation by DG.

Further, the hospital is found to be dominant in the relevant market based on (a) a market share of 75 per cent that it commands in the market of providing maternity services in high-end multi-

speciality hospitals in the wards of S, L, N and K/E of Mumbai; (b) distinct brand value and reputation in the relevant market; and (c) a National Accreditation Board for Hospitals & Healthcare Providers (NABH) rating amongst the top 10 hospitals in western India.

Accordingly, the condition imposed by the said hospital to avail the stem cell banking services of Cryobanks only, appears to be an unfair condition and a *prima facie* violation of Section 4 i.e. abuse of dominant position, requiring further investigation by DG.

Thus, CCI found *prima facie* evidence that the hospital may have abused its dominant position under the Competition Act, 2002 and directed the DG to investigate the matter.

# Suo Motu Investigation of Asbestos Cement Sheet Cartel

**High concentration in the market, product homogeneity, inelastic demand for the product and active association of manufacturers are some factors, which led to initiation of this investigation.**

CCI is investigating the alleged cartel in the asbestos cement sheet industry. Investigation was triggered from a reference made by Serious Fraud Investigation Office (SFIO) on the basis of a complaint received by them. The role of the Asbestos Cement Products Manufacturers Association (ACPMA) is under scanner for facilitating the cartel and controlling production volumes and sale prices. The Commission has taken *suo motu* cognizance of alleged anti-competitive conduct of ACPMA.

Asbestos cement sheets are widely used for roofs in low cost houses, sheds, warehouses etc., and are mainly used in the rural areas. The market of asbestos cement sheets consists of 20 big firms and 68 manufacturing units, of which top six players hold 87 per cent of the market share. High concentration in the market, product homogeneity, inelastic demand for the product and active association of manufacturers are some factors, which led to initiation of this investigation. The matter is under investigation by DG.



# ADVOCACY INITIATIVES

## Conference on 'Curbing Deficit through Effective Competition in Public Procurement'



**The conference focussed on one of the important stakeholders - financial advisers and key procurement officials of various departments and ministries of the Central Government.**

CCI organised a conference on 'Curbing Deficit through Effective Competition in Public Procurement' on October 10, 2012. The conference focussed on one of the important stakeholders - financial advisers and key procurement officials of various departments and ministries of the Central Government. The conference sensitised stakeholders

about the key provisions of the Competition Act, 2002. Mrs. Meena Aggarwal, Officer on Special Duty, Public Procurement Division, Department of Expenditure was one of the key speakers at the conference. The conference was attended by about 100 officials representing 35 departments and ministries of the Central Government.

# Conference on 'Audit of Public Procurement Transactions & Competition Law'

CCI organised a conference for senior officers of the Comptroller & Auditor General (CAG) of India on the theme 'Audit of Public Procurement Transactions & Competition Law' on December 7, 2012. CCI Member Mr. R. Prasad, in his inaugural address, highlighted the importance of honing the skills of audit officers with the awareness of basic nuances of the competition law,

especially the provisions relating to detection and prevention of bid rigging, which adversely affects the exchequer. He added that competition law awareness will add a new dimension to the multifarious role of audit officers and stressed the rampant prevalence of anti-competitive practices in public procurement process. The feedback of the

participants was very encouraging. Most of the participants emphasized the need of having a mechanism, through which CCI and CAG can jointly address the issues of bid rigging in public procurement. Hence, the conference proved to be a good source of information for audit officers and a tool for their capacity building.

## Interactive Meeting on 'Competition Law & Trade Associations'



CCI organised an interactive meeting with the trade associations representing various sectors of the economy on December 17, 2012. The objective of the meeting was to

engage in a dialogue and open two-way communication channels between the Commission and the representatives of leading trade associations. Such meetings, part of the outreach activities of CCI, aim

to develop a congenial atmosphere to address concerns in competition enforcement and compliance.

CCI Chairperson Mr. Ashok Chawla stated that trade associations can play a pro-active role in competition compliance by regulating the conduct of their members to comply with the competition law. These bodies can be pivotal in internalising competition compliance programme to avoid cost of non-compliance of the competition law. CCI Member Mr. M. L. Tayal emphasized the need for change in mind-set and development of competition culture within the organisation so that the economy is benefitted through the enhanced competition in the markets. The concerns raised by the associations were addressed by the Chairperson and Members of the Commission.



# EVENTS

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## Leadership & Team Building Workshop

An off-site "Leadership & Team Building" workshop was organised for the officials of CCI during December 14 -16, 2012. The various interactive sessions of the workshop aimed to enhance communication skills, personality development and leadership skills of the officers and build a spirit of team work in the organisation. The workshop provided excellent opportunity to officials to bond horizontally across divisions and vertically across hierarchies. Such workshops contribute towards laying the foundation of a cohesive organisation.



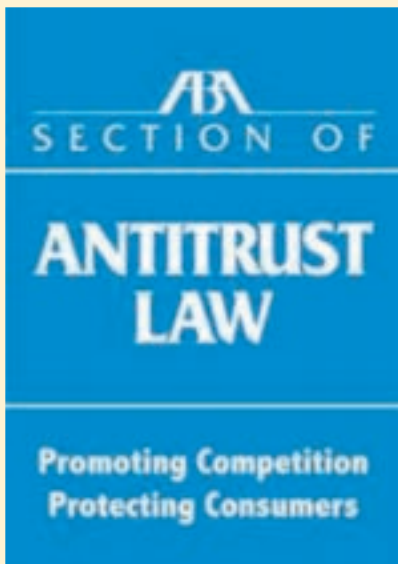
## Distinguished Visitor Knowledge Sharing Series

Prof. Arvind Panagariya delivered the fifth lecture under "Distinguished Visitor Knowledge Sharing Series" on "India's Tryst with Destiny" on December 13, 2012 in CCI. Arvind Panagariya is a Professor of Economics & Jagdish Bhagwati Professor of Indian Political Economy at Columbia University. Such lectures enable CCI to tap knowledge of eminent persons in various fields.



# ENGAGING WITH THE WORLD

## Participation in ABA Conference in New Delhi



The American Bar Association Section of Antitrust Law organised a conference on "Antitrust in Asia Conference: Developments in India's Competition Regime" in New Delhi during November 30 -

### **CCI Chairperson Mr. Ashok Chawla delivered the keynote address on 'Developments in India's Competition Regime'.**

December 1, 2012. The conference covered the emergence of competition law and policy over the past decade in leading jurisdictions in Asia, with a special focus on India. The conference also provided a platform for meeting of enforcement officials and leading private practitioners around the world to discuss trends in anti-trust enforcement by competition agencies worldwide. The

conference consisted of a wide range of practical panels, which addressed issues of multi-lateral cooperation, cartels and leniency programs, merger procedures and merger control standards, dominance and monopolization, procedural fairness and related due process considerations, and the institutional design of competition agencies. CCI Chairperson Mr. Ashok Chawla delivered the keynote address on 'Developments in India's Competition Regime' on December 1, 2012. He was also a panelist in a discussion of enforcers led by former United States FTC Chairman Prof. William Kovacic. Two senior officials of the Commission were also panelists in other key sessions of the conference.

## International Events

CCI officials participated in various workshops/ seminars/ meetings, some of which are :

- Taiwan Fair Trade Commission's seminar on "Unilateral Conduct: Excessive Pricing and Anti-Competitive Practices" in Makati City, Philippines during October 3-4, 2012.
- OECD-Korea Policy Centre's Competition Programme on "Competition Issues in the Aviation Sector" in Busan, Korea during October 17-19, 2012.
- OECD's Competition Committee meeting in Paris, France during October 24-25, 2012.
- ICN's Advocacy Working Group Workshop in Paris, France during October 26-27, 2012.
- ASEAN Experts Group on Competition (AEGC)'s "Impact and Benefits of Competition Policy and Law on Business in ASEAN" in Darussalam, Brunei during November 7-8, 2012.
- ICN Merger Working Group workshop organised by the Colombian Competition Authority in Bogota, Columbia during November 8-9, 2012.

## Distinguished Visitor from Abroad

# de la **Autorité** de la **concurrence**



**Autorité de la concurrence (French Competition Authority) President Mr. Bruno Lasserre visited CCI to discuss issues of mutual interest with the Commission. His visit laid the foundation for developing relations between the two agencies for sharing of information, experiences and best practices.**

# DEVELOPMENTS IN OTHER JURISDICTIONS

## Emirates, Cathay Pacific, Singapore Airlines and Thai Airways Settle Price-Fixing Case in Australia

ACCC Chairperson Mr. Rod Sims said, "This result sends a strong message that the ACCC and the Australian courts will not tolerate any business – regardless of size or country of origin – engaging in cartel conduct that harms competition in Australia".

Australian Competition and Consumer Commission (ACCC) commenced proceedings against Singapore Airlines in 2008 and against Emirates, Cathay Pacific and Thai Airways in 2009, alleging engagement in cartelisation including fixing prices relating to fuel and other surcharges. In October 2012, the Federal Court in Sydney ordered Emirates to pay penalty of AUD\$ 10 million and in December 2012, Federal Court ordered Cathay Pacific Airways

Ltd., Singapore Airlines Cargo Pte Ltd. and Thai Airways to pay penalties of AUD\$ 11.25 million, AUD\$ 11.75 million and AUD\$ 7.5 million respectively. In addition to the penalty, court ordered them to restrain from engaging in similar conduct for five years.

Emirates, Cathay Pacific, Singapore Airlines and Thai Airways are the 10th, 11th, 12th and 13th airline to settle in these proceedings and total penalty imposed so far is

AUD\$ 98.5 million. These are the highest penalties ever imposed in a single ACCC investigation. Some of the airlines that have previously settled include Qantas Airways, British Airways, Société Air France, Koninklijke Luchtvaart Maatschappij NV (KLM), Martinair Holland NV and Cargolux International Airlines SA. The ACCC also has legal action under way against Air New Zealand and Garuda Indonesia.



# WHAT PEOPLE SAY ABOUT 'FAIR PLAY'

"...will help in disseminating information and in 'demystifying' the CCI. Initiatives such as this contribute to good governance."

**Dr. D. Subbarao, Governor,  
Reserve Bank of India**

"...creates greater awareness about the competition policy framework in India and how it contributes to a level playing field and economic growth."

**Ms. Nirupama Rao,  
Ambassador of India to the  
United States**

"...contents and layout of the publication are very impressive for which I compliment the editorial team."

**Mr. Sudhir Krishna, Secretary,  
Ministry of Urban  
Development**

"...well documented and informative materials are extremely useful and of great interest not only for our Agency but for all our colleagues ..."

**Mr. Igor Artemiev, Head, Federal  
Antimonopoly Service, Russian  
Federation**

"...it is an excellent and very informative outline of your work."

**Dr. Mark Berry, Chairman,  
Commerce Commission, New  
Zealand**

"... fully support Government initiative in creating a culture of fair and transparent competition. We would also ensure that we periodically keep our member abreast of your activities. "

**Mr. Som Mittal, President,  
NASSCOM**

"...a treasure of information and very useful for various Ministries and Departments of Government of India."

**Dr. Mrutyunjay Sarangi ,  
Secretary, Ministry of Labour  
& Employment**

"...quality of contents is very interesting; particularly the last article "Knowing Your Competition Law" is quite informative."

**Mr. Sudhir Vasudev, Chairman  
& Managing Director, ONGC**

# KNOWING CCI

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In the previous issue of the newsletter, 'Competition Architecture in India' was discussed. In this issue, let us get acquainted with the Competition Commission of India (CCI).

## CCI and its Functions

CCI is a statutory authority established under the Competition Act, 2002. All enterprises, including public enterprises and government departments, come under the jurisdiction of CCI, except the sovereign functions of the Government including activities dealing with atomic energy, currency, defence and space. CCI aims to create and sustain fair competition in the economy that will provide a 'level playing field' to the producers and make the markets work for the welfare of the consumers. In pursuance of this objective, CCI inquires cases of anti-competitive agreements, abuse of dominance and combinations having appreciable adverse effect on competition in India. CCI imposes remedial actions, including imposition of heavy penalties against firms engaged in practices that impede free and fair competition in the market and which are anti-consumer.

## Background

CCI was originally set up in October 2003, but the writ petition filed in the Supreme Court delayed the establishment of CCI and the enforcement of the Act. Only the advocacy function could be notified and only one member was appointed. The Competition Act was amended by the Competition (Amendment) Act of 2007. CCI comprising of Chairperson and six members (appointed by the Central

Government) was set up on March 1, 2009.

## Structure of CCI

During the initial years, CCI's focus has been on setting up an appropriate organisational structure necessary for effective competition regulation. Administrative functions of the Commission are coordinated by Secretariat, which is headed by the Secretary. The office of Director General (DG) investigates contravention of the provisions of the Competition Act and is headed by Director General. In addition, CCI has seven divisions namely Advocacy, Anti-Trust, Capacity Building, Combination, Economic, Investigation and Legal. Each division is steered by an Adviser and has a team of professionals from the field of economics, law and finance. The divisions assist the Commission in fulfilment of the legal mandate.

## Functioning of Various Structural Units

**Secretariat:** The Secretariat coordinates all the administrative activities of the Commission. The Secretary is the nodal officer on behalf of the Commission for sending or receiving all statutory communications. The Secretary is the custodian of records of the Commission and exercises such other functions as may be assigned by the Chairperson.

**Advocacy Division:** In pursuance of the advocacy mandate under Section 49 of the Act, the Commission has entrusted a dedicated division to undertake advocacy activities with the stakeholders to inculcate the competition culture in the economy. The Division is also responsible for media management

and public relations along with issues relating to IT and library services.

**Anti-Trust Division:** The Anti-Trust Division comprises of multi-disciplinary teams for analysing cases pertaining to suspected or alleged violations of Section 3 and 4 of the Act. Case analysis takes place at both preliminary stage of determining the existence of *prima facie* case as well as on the receipt of the investigation report from the DG.

**Capacity Building Division:** Capacity building is imperative for effective functioning of CCI. The Division is dedicated towards capacity building of the officials of CCI and organizes in-house induction training, advanced trainings, workshops, seminars etc. The Division also strives towards knowledge development & management. Another important task entrusted to the Division is international cooperation. In pursuance of this responsibility, the Division develops linkages with other jurisdictions as well as relevant multilateral organisations such as UNCTAD, OECD and ICN.

**Combination Division:** Armed with multi-disciplinary teams, the Combination Division assists the Commission in conducting assessment of the likely anti-competitive effect of the merger over specified thresholds as per Sections 5 and 6 of the Act. The Division adheres to the timelines prescribed in the Act and regulations and also handles the work of pre-notification consultations.

**Economic Division:** The Economic Division ensures cohesive and systematic integration of economic analysis into the

enforcement of the Act. The Division examines individual cases both at *prima facie* stage and on the receipt of DG's report and provides specific economic perspective to the Commission. It also undertakes appropriate sectoral and other economic studies and research projects.

**Investigation Division:** The Investigation Division provides support in regard to investigations and financial analysis. The Division also undertakes necessary research as well as utilises reports generated by Economic Division for recommending *suo motu* action for violation of Sections 3 and 4.

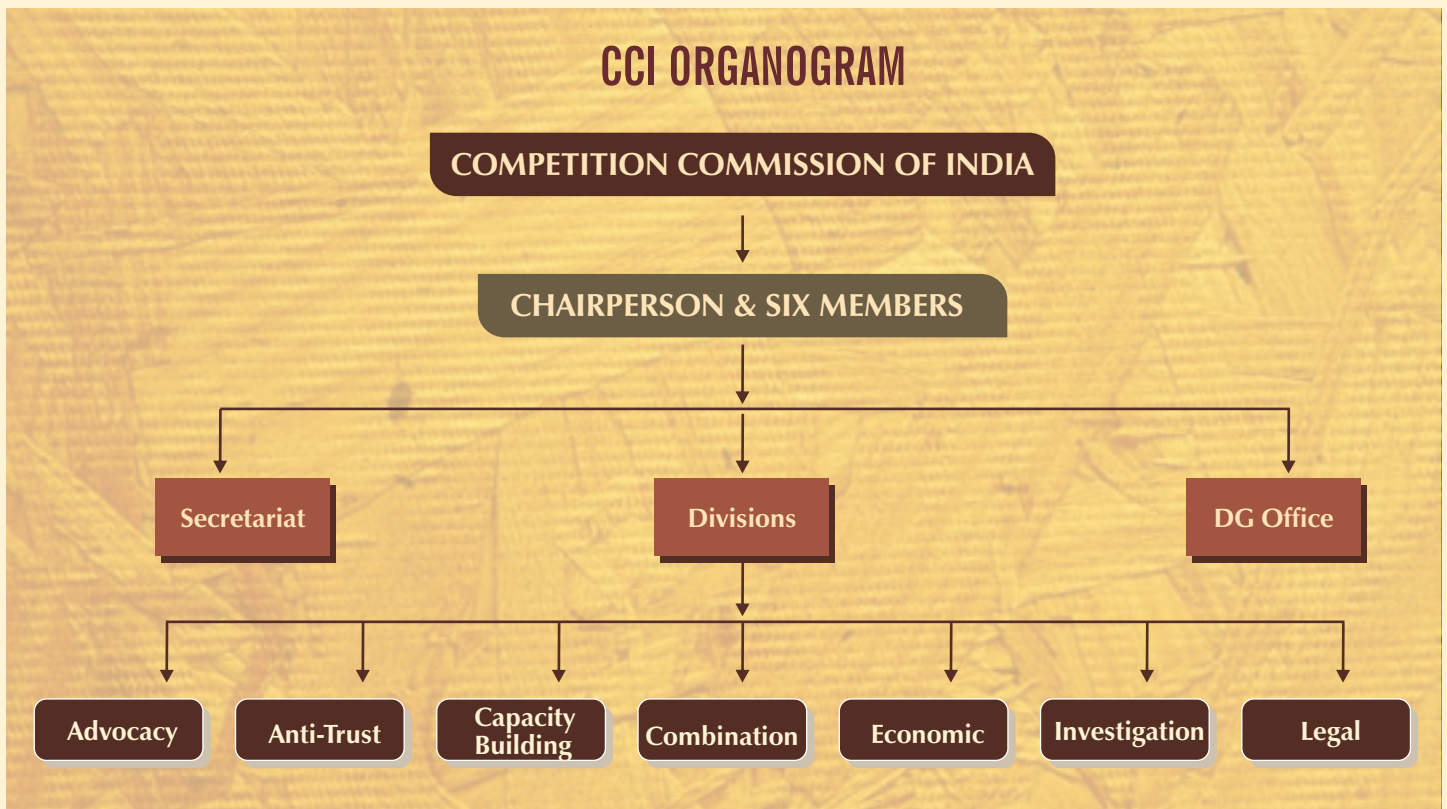
**Legal Division:** The Legal Division provides legal advice and opinion to the Commission along with rectifications, penalties and recovery of litigation. It gives specific inputs to case analysis teams on the legal issues, both at the stage of determining as to whether there is a *prima facie* case and scrutiny of DG's report along with further inquiry and issue of the orders of the Commission.

**Office of the Director**

**General (DG):** DG office, the investigation arm of CCI, assists the Commission in conducting enquiry into any contravention of the provisions of the Act or any rules or

regulation made thereunder. The DG office can discharge their functions as conferred under Section 36(2) of the Act including: (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; and (e) requisitioning, subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such of record or document from any office.

## CCI ORGANOGRAM



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Please visit [www.cci.gov.in](http://www.cci.gov.in) for more information about the Commission.  
For any query/comment/suggestion, please write to [capacitybuilding@cci.gov.in](mailto:capacitybuilding@cci.gov.in)

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