



Detection and Prevention of Bid- Rigging – Provisions of Competition Act, 2002

**A Presentation
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New Delhi , 14th March 2012**



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Agenda

- 1. Legal Framework and Developments in Brief.**
- 2. Agreements , Cartels, Bid-Rigging**
- 3. Inquiries, Remedies and Penalties.**
- 4. Competition Enforcement Scenario in India and International Experiences.**
- 5. Why and how to avoid Bid Rigging?**
- 6. Conclusion.**
- 7. Q&A - Discussion Points.**

Legal Framework –Contd.

1.1 Legal Framework and Development of Competition Laws in India

- Shift in focus from curbing monopolies to promoting competition after commencement of New Economic Policy in 1991, led to constitution of a Committee in 1999 (Raghvan Committee) to examine the existing MRTP Act.
- Based upon recommendations of the Committee and after detailed deliberations , Competition Act, 2002 was enacted.
- Initially notified in January, 2003, enforcement delayed due to certain legal issues raised in courts.
- Act amended in the year 2007

Legal Framework-Contd.

1.2 Competition Act, 2002;

- Prohibits Anti-Competitive Agreements (Sec 3)
- Prohibits Abuse of Dominant Position (Sec 4)
- Regulates Combinations (Sec 5&6)
- Mandates Competition Advocacy (Sec 49)

Horizontal Agreements and Cartels

2.1 Provisions of Section 3 and agreements

- **Section 3 of Competition Act deals with anti-competitive agreements - both horizontal and vertical.**
- **No enterprise or associations of enterprises or person or associations of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services; which causes or is likely to cause an appreciable adverse effect on competition within India - Section -3(1).**

Horizontal Agreements and Cartels

- **As per Section 2(b) agreement has an inclusive definition and includes any arrangement or understanding or action in concert whether or not;**
- ❖ **Such agreement, understanding or action is formal or in writing.**
- ❖ **Such agreement, understanding or action is intended to be enforceable by legal proceedings.**

Agreements - Contd.

2.2 PROVISIONS AS REGARDS HORIZONTAL AGREEMENTS – Section 3(3)

- **Any agreement** entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprises **or practice carried on, or decisions taken by, any association of enterprises or association of persons, including cartels**, engaged in identical or similar trade of goods or provision of services, shall be presumed to have appreciable adverse effect on competition and therefore void if it :
 - ✓ **directly or indirectly determines purchase or sales prices.**

Horizontal Agreements –Contd.

- ✓ limits or controls production, supply, markets, technical development, investment or provision of services.
- ✓ 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.
- ✓ **directly or indirectly results in bid rigging or collusive bidding.**

Cartels

2.3 Cartels- Some definitions

- Cartels as per Section 2 (c) ;

“ Cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.”

- A cartel is an agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, **bid-rigging**, establishment of common sales agencies, and the division of profits or combination of these.

Cartels-Contd.

2.4 Cartel conduct and impact

2.5 Typically four types of cartel conduct:

- price fixing;
- market sharing;
- output restricting; and
- **bid rigging.**

2.6 Impact of Cartel Conduct

- raises price above competitive levels resulting in injury to consumers and to economy.
- impacts consumers as it results in higher prices, poor quality and restricted choice.

Bid-Rigging

2.7 Bid-Rigging under explanation to Section 3(3)

Bid rigging means any agreement, between enterprises or persons referred to in sub-section (3) of Section 3, engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Features of Bid-Rigging

Bid rigging takes place;

When bidders collude;

- ✓ **To keep the bid amount at a pre-determined level.**
- ✓ **Such pre-determination is by way of intentional manipulation by the members of the bidding group.**
- ✓ **Bidders could be actual or potential ones, but they collude and act in concert.**

Features of Bid-Rigging

- Invitation of bids is resorted to both by Government and private bodies. Collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.
- If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending.
- Bid rigging is harmful because it
 - Eliminates or reduces competition
 - Artificially raises prices

Features of Bid-Rigging

- **Collusive bidding or bid rigging may occur in various ways. Some of the most commonly adopted ways are:**
 - **agreements to submit identical bids**
 - **agreements as to who shall submit the lowest bid**
 - **agreements for the submission of cover bids (voluntarily inflated bids)**
 - **agreements not to bid against each other**
 - **agreements on common norms to calculate prices or terms of bids**

Features of Bid-Rigging-Contd.

- agreements to squeeze out - outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis
- agreement as to the bids which any of the parties may offer at an auction for the sale of goods
- agreement through which any party agrees to abstain from bidding for any auction for the sale of goods, which eliminates or distorts competition
- Compensation system to the unsuccessful bidders by sharing profits of successful bidders.

Forms of Bid-Rigging

- **Bid rigging may take many forms, but most bid rigging conspiracies usually fall into one or more of the following categories:**
 - **Bid Suppression**
 - **In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.**

Forms of Bid-Rigging

□ Complementary Bidding

- Complementary bidding (‘cover’ or ‘courtesy’ bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer’s acceptance, but are merely designed to give the appearance of genuine competitive bidding.
- Complementary biddings are the most frequently occurring forms of bid rigging, and the bidders defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

Forms of Bidding

- **Complementary Bids**

ITEM -X

ITEM-Y

Year 1	A	Rs. 100	B	Rs. 110
	B	Rs. 130	A	Rs. 140

Year 2	A	Rs. 120	B	Rs. 130
	B	Rs. 150	A	Rs.160

- **Year 3**

A	Rs. 140	B	Rs.150
B	Rs. 170	A	Rs.180

Forms of Bid-Rigging

Bid Rotation

- In bid rotation schemes, all parties submit bids but take turns to be the lowest bidder.
- The terms of the rotation may vary; competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each party in agreement or allocating volumes that correspond to the size of each such party.

Bid-Rotation

- All parties submit bids, but take turns being the lowest bidder
- The terms of the rotation may vary
 - Company X submits the low bid first time
 - Company Y submits the low bid next time
 - Company Z submits the low bid third time

Rotation of Bids

ITEM - A

	Year 1	Year 2
• Firm A	Rs.100	Rs. 140
• Firm B	Rs.120	Rs. 120
• Firm C	Rs.130	Rs.130
• Firm D	Rs.140	Rs. 100

ITEM-B

	Year 1	Year 2
• Firm B	Rs.100	Rs.140
• Firm C	Rs.120	Rs.130
• Firm D	Rs.130	Rs.120
• Firm A	Rs.140	Rs. 100

ITEM-C

	Year 1	Year 2
• Firm D	Rs. 100	Rs. 140
• Firm A	Rs. 120	Rs. 130
• Firm B	Rs. 130	Rs. 120
• Firm C	Rs. 140	Rs. 100

ITEM-D

	Year 1	Year 2
• Firm C	Rs. 100	Rs. 140
• Firm D	Rs. 120	Rs. 120
• Firm A	Rs. 130	Rs. 130
• Firm B	Rs. 140	Rs. 100

Forms of Bid-Rigging

Subcontracting

- **Subcontracting arrangements are often part of a bid rigging scheme.**
- **Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder.**
- **In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.**

Forms of Bidding

Market Allocation

- **Agreements by which competitors divide markets among themselves.**
- **Division could be by territory, by customer type or by Product.**
- **Company A only submits bids for north;**
- **Company B only submits bids for south ; and likewise**

Forms of Bid-Rigging

- **Almost all forms of bid rigging schemes have one thing in common**
- ✓ **an agreement among some or all of the bidders, which predetermines the winning bidder and limits or eliminates competition.**

Detection of Bid-Rigging- Red Flags

- **Suspicious may be aroused by unusual bidding or something a bidder says or does.**
- **Situations of suspicious behavior include the following (illustrative):**
 - **The bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation).**
 - **Bid documents contain the same corrections and alterations indicating last minute changes.**
 - **A bidder seeks bid documents for the competitor.**

Red Flags

- **A bidder submits bid of the competitor's also.**
- **A party brings multiple bids to a bid opening and submits its bid after coming to know who else is bidding.**
- **A bidder makes a statement indicating advance knowledge of the offers of the competitors.**
- **A bidder makes a statement that the bidders have discussed prices and reached an understanding.**
- **Same e-mail , same telephone, same address, same letter head.**

Problem Identification

- **Many officers have no training in procurement procedures.**
- **Most of them think that as long as they select L1, they are following the correct procedure.**
- **Importance of institutional mechanism in place.**
- **Many countries use electronic system of surveillance and detection like BAMS in USA.**

3. Inquiry into Agreements and Bid-Rigging

3. Steps of Inquiry

- The Commission is empowered to inquire into cases of anti-competitive agreements and cartels;
 - either on its own motion or
 - on receipt of information or
 - on reference made to it by the Central Government or State Govt. or statutory authority.
- In case the Commission is convinced that prima facie case exists, it shall direct the Director General to investigate and furnish report.

Inquiry into agreements - Contd.

3.1 Hard Evidences

- **Agreement Documents**
- **Illegal written document e.g. of collective boycott, price fixing, volume allocation, market sharing.**
- **E-Mails**
- **Pricing Documents**
- **Cartel Score Sheets**
- **Budget Maps**
- **Maps Showing divisions of Territory or Region**
- **Documents Referencing Geographic Areas**
- **Communications between competitors**

Inquiry into agreements - Contd.

- **Identifying Officers, Directors, and those Responsible for Pricing Decisions**
- **Bid Documents**
- **Calendars, Appointment Books, Travel Records, Telephone Logs, Passports**
- **Contacts/Meeting Notes**
- **Announcements**
- **Trade Association Documents**

Remedies and Penalties under Indian Competition Act

3.2 After inquiry if contravention is established, the Commission may pass all or any of the following orders;

- ✓ **direct any enterprise or associations of enterprises or person or associations of persons to discontinue and not to re-enter such agreement or discontinue abuse of dominant position**
- ✓ **impose such penalty as it may deem fit not exceeding 10% of the average of the turnover for the last three preceding financial years upon each of person or enterprise**

(if any anti-competitive agreement was entered into by cartel, it may impose upon each producer, seller, distributor, trader, or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, which ever is higher.)

Remedies and Penalties- Contd.

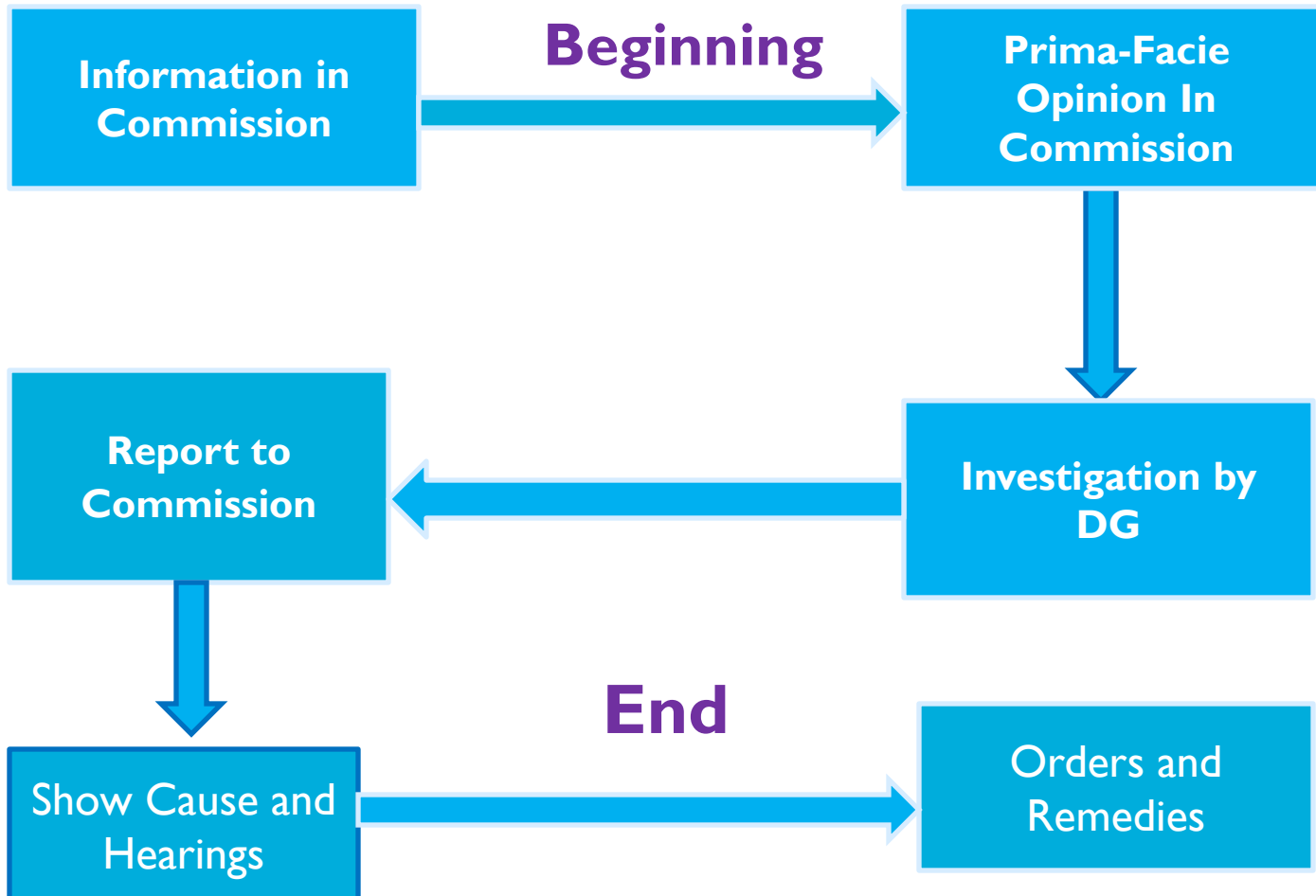
- ✓ **direct that agreements shall stand modified to the extent and in the manner as may be specified in the order of the Commission.**
- ✓ **Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any.**
- ✓ **Pass any other order or issue directions as it may deem fit.**

Power to issue interim order and leniency

- **During the pendency of an inquiry, the Commission, may by order, temporarily restrain any party from carrying on acts prohibited under the Indian Competition Act, until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.**
- **The Indian Competition Act also empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. (Section 46)**

4. CCI-Flow of Work

- **Process Flow**



Cases of Bid-Rigging –Indian Experience

- **Case of LPG cylinder manufacturers**
- **Common and identical rates in tender of IOCL by about 50 bidding concerns.**
- **Identical rates even when cost of production, location of factory from place of supply were different.**
- **Meetings held a day before the tender.**
- **Penalties imposed to the tune of Rs.165 crore**

International Experiences

4.1 Developments in Some Jurisdictions

A) Russia

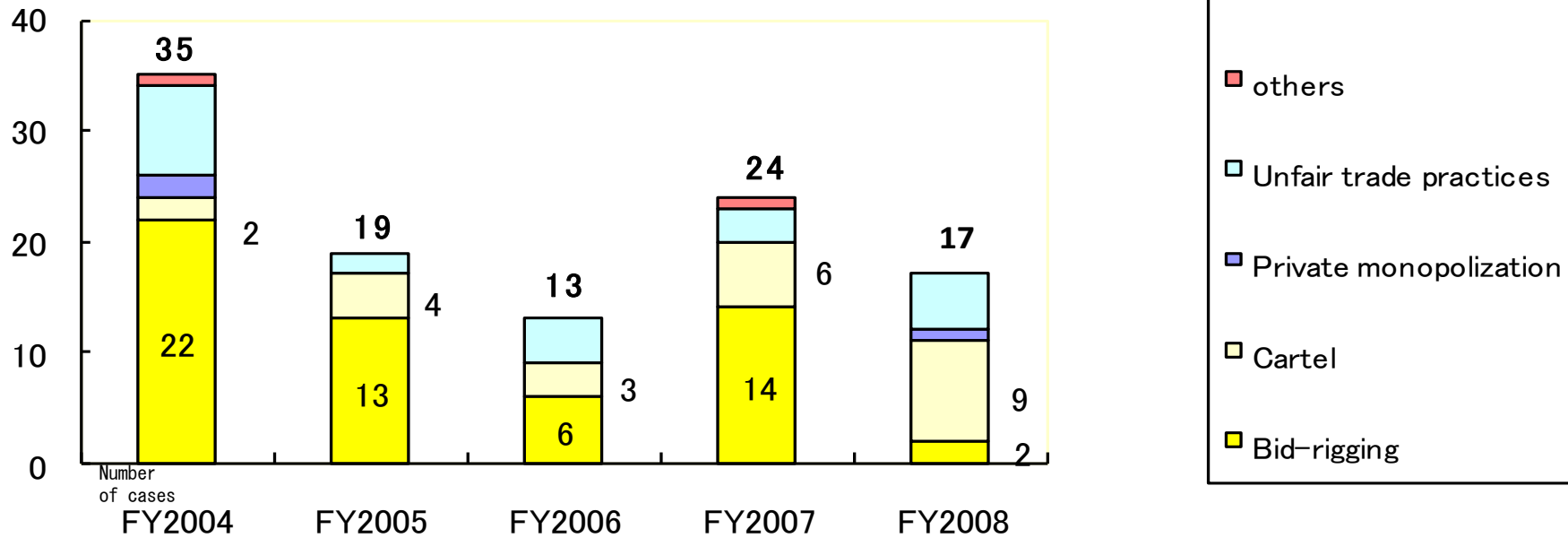
- **Criminal responsibility for anticompetitive agreements under new version of the Article 178 of the Criminal Code of the Russian Federation,**
- **Per se prohibition of cartels.**
- **Specialized Anti-Cartel Department.**



International Experiences

B) Japan

Numbers of cases where legal measures were taken





Japan-Contd.

- *Dango* is a negotiation among bidders for a Japanese public-works contract in which it is decided which firm will get the job. The designated firm submits a high bid and its "rivals" bid still higher, maintaining the illusion of competition. For the firms this is a congenial way to do business. Under *dango* each firm knows that it will eventually "win" a contract, without having to go to the trouble of competing;
- (Source: *DANGO: JAPAN'S PRICE-FIXING CONSPIRACIES* by John McMillan)

Other Jurisdictions

C) UK

- Penalties imposed on construction companies involved in bid rigging

D) Brazil

- **Cartel - a crime in Brazil : Jail term or criminal fine**
- **More than 100 executives facing criminal proceedings**
- **Creation of Anti-Cartel Enforcement Day by a Presidential Decree**

5. Why we should be worried about Bid-rigging

- **Public procurement in India constitutes about 30% of the GDP.**
- **Departments like Defence, Railways and Telecom, devote about 50% of their budget to procurement, which happens to be higher than the expenditure of most of the State Governments.**
- **About 26% of the health budget is devoted to procurement. A sound procurement system is therefore crucial for ensuring national security, safety of passengers, health of the citizen and the quality of infrastructure and services.**
- **(Source: Special address by Shri Pratyush Sinha, Former CVC Competition, Public Policy and Common Man, 16th November 2009)**

Steps to Detect Bid-Rigging

- There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should :
- Be well informed before designing the tender process
- Design the tender process to maximize the potential participation of genuinely competing bidders
- Define requirements clearly and avoid predictability
- Design the tender process to effectively reduce communication among bidders
- Carefully choose the criteria for evaluating and awarding the tender

Steps to Check Bid-Rigging

- **Maintain procurement records**, e.g., bid lists, abstracts, and awards. When collusion is suspected, it is necessary to review the procurement history of a product to determine if a pattern of bid allocation or rotation exists.
- **Ask questions** If the prices or bids submitted don't make sense, ask the vendors to explain and justify their prices. All this may provide a reasonable explanation or the suspicions may be heightened by a bogus answer.
- **Know and understand the dynamics of the markets** in which major purchases are made. A knowledgeable buyer may correctly suspect collusion from market behavior that may not arouse suspicions in an uninformed buyer.

Some Industries are More Susceptible

- Be especially vigilant when dealing with:
 - **Homogeneous products**
 - **Non-complex product or service**
 - **No significant technological changes**
 - **Products with few or no close substitutes**
 - **A small number of suppliers**
 - **Few new entrants**
 - **An active trade association**
 - **Low expectations of enforcement**

Warning Signs During Tendering

- **Significant change from past price levels.**
- **Competitors' bids are received together or common agents are appointed to submit bids.**
- **Identical irregularities in bids.**
- **Winning bidder subcontracts work to unsuccessful bidders**

More Warning Signs

- **Suppliers meet before they submit tenders.**
- **Suppliers that would normally tender fail to do so.**
- **The same supplier is often the successful bidder.**
- **Winning bidder does not accept the contract.**

Warning Signs-Contd.

- **Bids from local companies involve similar transportation costs as non-local bidders.**
- **Large difference between price of winning bid and other bids.**
- **Range of quoted prices has moved suddenly.**
- **Pattern of rotating successful bids among several suppliers.**

What to do when one suspects bid-rigging

- Record details thoroughly.
- Maintain confidentiality.
- Decide whether or not to continue with the tender.
- Contact Competition Commission of India.





Join Hands To Prevent Bid Rigging

- **Bid-rigging and other anti-competitive practices can cause serious economic harm.**
- **Prevention, detection, and reporting may go a long way.**
- **Working together, we can help maintain a competitive marketplace.**

6. Conclusions- Importance of Competition

- **Competition - fourth corner-stone of the public policy framework, along with the monetary, fiscal and trade policies. The benefits of competition to;**

CONSUMERS

- **Wider choice of goods, services and suppliers**
- **Better quality and improved value for money**

BUSINESSES

- **Level playing field; redressal against anti-competitive practices**
- **Competitively priced inputs**
- **Greater productivity and ability to compete in global markets**

GOVERNMENTS (Central and State)

- **Optimal realization from sale of assets**
- **Savings of public money in procurement**
- **Enhanced availability of resources for social sector**



The Fair Trading Commission (www.jftc.com)

Illustration by Kevin Day

Thanks

- Views are personal
- Facts for different jurisdictions have been collected out of presentations made by different authorities and as available in Public domain.

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