The Market Regulator: Exploring Areas of Mutual Co-operation

Good Afternoon, distinguished …ladies and gentlemen ….

Let me, at the outset, thank the Central Vigilance Commission for inviting me to deliver this talk. After the receipt of request from CVC, I mulled over what is that one should be speaking on as a market and fair play regulator. And, are there areas where both the institutions can work together. As we all know, CVC is the apex vigilance body charged with responsibility of monitoring vigilance activities as well as for advising the Central Government on it. The Competition Commission of India, on the other hand, is a competition watchdog, entrusted with the responsibilities to oversee competition and check anti-competitive behaviour in the market place. Competition Commission of India is additionally performing the task of giving approvals to proposals for mergers and acquisitions after assessing whether they have any appreciable adverse effect on the market or not. In fact, the task mandated to the Commission is to prevent practices having an appreciable adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.

2. After contemplation and with the limited experience one has gained at the Competition Commission, I could identify areas where both of us may have interest. In the course of our work in anti-trust cases, CCI undertakes investigation through the Director General of Investigation. The investigation provides access to lot of market information and data specific to the industries/markets against which a complaint is made. This includes investigations in cases in which public procurement is made by the Government agencies. The Competition commission has received cases of public procurement by the Ministry of Railways, Defence, as well as State Governments where there are allegations of bid rigging and cartelisation by the suppliers. During the investigation, our focus is chiefly on the behaviour of the suppliers who are alleged to be involved in such conduct. But we do get to see and analyse the behaviour of those charged with the responsibility of procurement in the organization, not only for the period under investigation but also of the previous period. I will be later taking a few specific examples to demonstrate what, at times, may amount to connivance by the Officers, active or passive, by those in the organization by not paying the attention required. But it is this which has made me speak on today's subject *viz.* "The Market Regulator: Exploring New Areas of Mutual Cooperation".

3. Before I deal with the areas of cooperation, let me briefly touch upon the history which lead to the emergence of competition law and the competition regulator. As you may be well aware, from 1947 to 1991, India's development strategy was highly

interventionist. The State had control over almost all the sectors of economy. The State justified its near-total role in economic planning in the name of socialism. For all intents and purposes, India was a closed economy with institutionalised layers of administration which were not pro-private sector, pro-foreign investment and pro-technology. During this period of development, licence, permit and quota raj dominated, which stifled domestic entrepreneurship. The result was Hindu rate of growth, a sarcastic term which was used to describe the 3.5 per cent trend of growth rate in India from 1950s to early 1980s. It is often said that while the Founding Fathers took many great steps, encouraging competition was not one of them.

4. The economic system which was designed immediately after independence was inherently anti-competitive. It did not tap the constructive role of the market in terms of fostering initiative, permitting efficiency and coordinating complex economic operations. Instead, the licence-permit raj made entrepreneurs negotiate numerous government permissions and clearances for business initiatives and they were left to the mercy of bureaucrats, large and small. The State did not play a constructive role and instead of using its energies for positive action in development of infrastructure and building a functioning system of accountability and collaboration for public services, the State expended its energies on regulation of quotas and promotion of public sector which was afflicted with systematic inefficiencies and heavily obstructionist unionised labour force. Having a large size in

business was considered evil and this lead to the enactment of the Monopolistic and Restrictive Trade Practices Act. State could create monopolies and this could not be challenged. But private monopolies were considered bad. The consumers' choice was restricted and, prior to 1991, we lived in an era which was marked not only by a non-achievement environment but was also an era of shortages.

5. Over a period of time, it was becoming clear that the Central command economy was not facilitating the country's economic growth and we possibly were missing out an opportunity of becoming an economic powerhouse, in the mould of many of the East Asian tigers, some of which had become independent around the same time as India. The acute balance of payment crises of 1991, was the trigger when the then government had no option left but to open up. The decade between 1991-2001 was a period which witnessed liberalization, privatization and globalization of trade, business and policies. The object of the reform process was to increase efficiency and international competitiveness of industrial production and promote growth. This mandated the creation of a level playing field within our economy and having an organization that could promote and sustain competition in markets.

6. It is in this backdrop that the Competition Act, 2002 came to be enacted and the Competition Commission of India came into existence. Due to judicial challenge, the Commission could not

assume its enforcement role immediately. Effective implementation of this Act could start only from 2009.The enforcement of Competition Act has been carried out in a phased manner. The Act mandates three areas of work. First relates to Anti-trust enforcements which deals with prevention of anti-competitive behavior and abuse of dominance in markets. The second relates to approval of Combinations due to mergers and acquisitions. Here the CCI does crystal-ball gazing into markets, to assesses the impact of proposed mergers and acquisitions on the competition in the market in the future. The third area relates to Competition Advocacy. In fact, it is this third area of work which came to be implemented first. The enforcement function relating to the Anti-trust provisions of the Act commenced in 2009 and that relating to merger review in 2011. Competition Law is sector neutral and ownership neutral. It applies equally to the Government, PSUs and State, as it does to the private sector. This is commonly known as the principle of competitive neutrality.

7. CCI, as a market regulator, has been formed with an objective to promote and sustain competition in the market. Competition stimulates innovation and efficiency. In a freely competitive market, businesses try to attract consumers by increasing quality and lowering prices. All of this finally benefits the consumer. Let us take the case of the Telecom Sector. The moment State monopolies in this sector were put to an end and competition was brought in, the Telecom landscape in India changed beyond recognition. The present Telecom network of India covers the

entire length and breadth of the country and we have a tele-density of nearly 100 percent – we have the third largest telecom network in the world having a wide reach and penetration. A complete bouquet of telecom services is available as elsewhere in the world, and India has one of the lowest tariffs in the world. The greatest beneficiary has been the consumer. We all remember a time when mobile phones were pride possession of rich and wealthy, but now it is common to see a mobile phone in hands of a rickshawpuller or even a maid who comes to your house. It is competition that has made the mobile phones and telephony services accessible to the common man. A look at other sectors– automobiles, aviation – show us how competition can change markets and make them consumer friendly. There are yet a few sectors like Railways, Roads, Insurance etc. where competition is yet to make an impact. This is not to say that State control is bad *per se*, but it is competition that has the potential to transform markets and economies.

8. For the economy to reap the benefits of competition, there is not only a need to promote competition and fair play in the market but also a need to see that it is sustained. Hence, the need for a market regulator. The Commission receives cases relating to various kinds of anti-competitive behavior including cartels, bid-rigging, collusive bidding, abuse of dominance etc. from diverse sectors of the economy, real estate, pharma, entertainment, financial sector etc. Of these, I would like to focus on procurement and, more specifically, public procurement, which is a common area

of concern for both CCI and CVC. Procurement at an inflated cost can lead to inefficient allocation of resources of the Government and that is why it is important.

9. We would all agree that transformational effects of competition are most needed in Government procurement so that benefits of competition like competitive pricing, product innovation and performance improvement coupled with competitive practices, are all achieved and which help ensure that government authorities get the best value for the public they serve. To give you an idea of how vital is public procurement to the economic system of a State, existing statistics suggest that public procurement accounts for 15% of Gross Domestic Product (GDP) worldwide on an average. In India, it constitutes about 30% of the GDP. Departments such as Defence, Railways and Telecom, devote nearly 50% of their budget to procurement. About 26% of the Health Sector budget is devoted to procurement. Now imagine if spending in these sectors is without transparency and accountability and there is apathy or nexus between government officials and the bidders. The anti-competitive practice by the bidders themselves and the conduct of the officials can do a considerable harm. Contrary to this, if the cost of government procurement, and specifically, the financial procurement, reduces even by 2% because of competition and competitive neutrality, the quantum of savings has the potential to wipe out the fiscal deficit.

10. Cases of anti-competitive conduct in public procurement come to the CCI from both the sides: One from the bidders alleging that the tender conditions imposed on them by the dominant Government authority are unfair or abusive. The second, from the government agency(ies) alleging that there is sharing of market or customers and, consequently, there is a bid rigging or collusive tendering. The latter is received by way of references. As a remedy, after investigation, the Commission can pass cease and desist orders and impose monetary penalties for such behavior. But competition issues are only one dimension of the problem. The other is the competition distortionery behavior being perpetrated by the Government Department(s) itself, for which Competition Commission has powers limited only to issuing an advisory. But if such a behavior is an outcome of sharing of gains in the deal, the proposition becomes more serious and the Competition Commission has no powers to address it. This will fall squarely in the domain of the Vigilance Commission at the Centre and the States.

11. In India, there is no central law governing procurement. However, comprehensive rules and directives exist in the General Financial Rules (GFR) framed by the Ministry of Finance. Also, Directorate General of Supplies & Disposals (DGS&D) and the Central Vigilance Commission (CVC) have issued guidelines prescribing the procurement procedure to be followed by all Central Ministries. The State Governments/Central Public Sector Units (CPSUs) have their own GFRs based on the broad principles outlined in the GFR. Some states like Tamil Nadu and Karnataka

have introduced legislation for procurement. The fundamental principle laid down under Rules are open/global tendering, advertisement, non-discretionery tender conditions etc. They are all aimed to encourage transparency and competition. But in actual practice, distortions creep in when it comes to their implementation. This happens more in situations in which agencies have a discretion which increases the scope and possibility for collusion. The experience of CCI has been that many a time, the procurement agency(ies) is well aware of such a collusion but turn a blind eye to it, perhaps, because there is a shared agenda. Before I come to the specific cases to illustrate this point, let me share with you how bid rigging and cartelization are looked at in other jurisdictions of the world. Globally, two trends are being increasingly discerned in enforcement of the cartels: One is the increase in the amount of fines which are being imposed on the cartelizing corporate or enterprises. The second is imposition of criminal sanctions on the individuals in the company who are responsible for cartelization. More and more competition jurisdictions are now moving towards criminalizing the behavior by individuals. The designation of cartel conduct as a criminal offence for the individuals, is a message the corporates, who need to review their anti-trust compliance policies and training programmes which apprise the employees and directors of their responsibility fully under the competition law. They also need to be apprised of the criminal sanctions which can apply in the event of their indulgence into such an act. At the same time, the internal procedures of the companies need to anticipate the risks that individual employees may avail of whistle blowing

opportunities and/or immunity programmes without the prior knowledge of the company.

12. All this highlights the seriousness with which competition jurisdictions worldwide view bid rigging and cartelization. In USA, Canada as well as many jurisdictions of Europe, South Africa, Australia and Japan, cartels have come to constitute a criminal offence. Contrary to this, in India and in most of the Asian countries, cartel enforcement is a civil proceedings. Although the architecture in our competition law allows us to target both the companies and the officials behind the offences and impose fines on them, we are not certain if that is enough and will send out the right message.

13. Let me move and show few slides relating to public procurement by different agencies. We are keeping the names of agencies/departments confidential for obvious reasons.

Fair Competition
For Greater Good

"The Market Regulator - Exploring Areas of Mutual Co-operation"

Shri Devender Kumar Sikri
Chairperson
Competition Commission of India

Fair Competition
For Greater Good

Some Illustrative Cases

A Case of Procurement by Railways

Fair Competition For Greater Good

- Various cases of bid rigging in procurement tenders for items such as flooring, seat covers, AC units, fans, etc.

Case 1 (Inaction by railway officials)

✓ Procurement only from RDSO approved suppliers
✓ Market limited to few suppliers
✓ Bidders aware if the same price is quoted, quantum of procurement would be divided among them
✓ Bidders shared market in the past
✓ Behaviour repeated over several tenders
✓ Railway officials take no action to expand the vendor base or curb the cartel
✓ Case reported to the Commission for reason of similar prices/ similar increase in prices.

Another Case of Procurement by Railways

Fair Competition For Greater Good

Case 2 (Active Participation and inaction)

✓ Only two suppliers for a railways item for several years
✓ Before issuance of a tender, discussions between Railways and bidders
✓ Officials informally communicate to quote previous negotiated rate to avoid delay
✓ Tender Committee (TC) does not object to identical prices
✓ TC recommends the rates to the Railway Board as reasonable and competitive
✓ Explicit provision made in the tender to cancel tender if cartel detected
✓ Railways do not take recourse to this and, instead, file a case with the Commission

COMPETITION COMMISSION OF INDIA

A Case of Procurement by State Government

Fair Competition For Greater Good

- ✓Government issues tender for procurement of aggregate quantity of a product
- ✓Suppliers shortlisted and allotted districts for supply of specified quantity of product after tendering
- ✓Actual orders fall short of specified quantity or there are no orders
- ✓Suppliers decide to share the markets as well as quantities in subsequent tender
- ✓Government holds negotiation - price not lowered
- ✓Govt. cancels the tender and files the case alleging cartelisation with the Commission

A Case of tender for Transportation by a PSU

Fair Competition For Greater Good

- ✓4 companies divide 4 districts amongst themselves.
- ✓Each year, one company quotes the L1 bid for its district
- ✓Practice continues for 4-5 years
- ✓Terms and conditions of tenders do not promote market entry and favour only 4 colluding bidders.
- ✓No remedial steps taken to curb this practice
- ✓Government reports the case to CCI

A Case of Procurement of Chemicals by a Municipal Body

Fair Competition For Greater Good

- ✓ Bid rigging alleged in a few tenders for procurement of chemicals
- ✓ 2 bidders under the same management give two different quotes
- ✓ This fact is known but not questioned
- ✓ Rotation of L-1 in each of the 5 preceding years
- ✓ Negotiation held on prices after bid opening each time
- ✓ Rates negotiated with L1 bidder; L2 and L3 bidder asked to match the price
- ✓ In most bids, bidders quote similar rates and divide quantities amongst themselves
- ✓ Phenomenon going on for years
- ✓ Case reported to the Commission when some members of the Board raise an objection

Irrespective of whether we were successful in getting the smoking gun or not, there were following common practices noted in each case.

Common Practices

Fair Competition For Greater Good

- Practice continuing for many years
- Limited number of vendors empanelled
- No attempt by authorities to expand vendors on the panel
- No action taken by authorities to curb cartelisation –even when option available with authorities
- Negotiation of prices with L1 bidder without exception and many-a-times, with others

COMPETITION COMMISSION OF INDIA

14. These cases show that collusion in prices by vendors and embezzlement of government funds are not separable in any such act of violation. Collusion will come within the purview of competition law. But dishonesty and embezzlement of funds falls in the domain of the public prosecutor or vigilance/anti corruption agencies. There is a felt need for coordinated enforcement to tackle both corruption and competition. It is for this reason that CCI needs to explore areas of cooperation with Central Vigilance Commission and Vigilance Commissions in the States. However, the questions that would need to be addressed in this regard are :-

(a) What should be the level of cooperation between the agencies and can we build it formally into the architecture of our acts/regulations?
(b) Can the process of sharing details with CVC and State Vigilance Commissions be undertaken by CCI pending the amendments?
(c) Will such a sharing have a dampening effect on the flow of referenes that CCI presently receives from the Government Departments?

15. While we think on these lines and work for furthering the area of cooperation, we can in the immediate future connect meaningfully by undertaking intense competition advocacy with a view to educate and sensitize those charged with responsibility of vigilance and public procurement. As an interim measure, we can also jointly look at the changes that need to be made in the

tendering process and in the extant guidelines with regard to holding negotiations with L1. The Competition Commission of India will be very happy to associate with the Central and State Vigilance Commissions in a meaningful manner which will help discharge each of the two agencies its responsibility better.

16. On this note, I thank you all once again for giving me an opportunity and for sharing my thoughts.

****