

# **SCOPE SYMPOSIUM ON COMPETITION LAW**

**12 JANUARY, 2021**

**Keynote Address by Chief Guest**

**Mr. Ashok Kumar Gupta, Chairperson, CCI**

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Shri Atul Soltiji, Director General, SCOPE, distinguished panellists and participants, my colleagues, and representatives from various esteemed public sector enterprises. A very good afternoon to all of you. Let me also take this opportunity to wish you all a very happy and safe new year.

1. It is a great pleasure to be here at this virtual symposium on Competition Law organised by SCOPE. The webinar provides a great opportunity for discussion on competition law and its relevance to public sector enterprises, especially with reference to public procurement. Such interactions play a vital role in creating greater appreciation and understanding of the law among the stakeholders and help them to put into perspective their role in the overall competition ecosystem.
2. Opening-up of the economy in 1991 necessitated the Indian markets to gear up to face competition from within and outside. This required putting in place a regulatory architecture to govern the harmful effects arising out of anti-competitive agreements, abusive

behaviour of dominant undertakings and regulation of mergers & acquisitions.

3. The benefits of competition in markets are now rarely questioned. We in India have been engaged over the past three decades in deregulating the economy and liberalizing policies and procedures in several areas.
4. A review of cross-country literature suggests that there is a positive correlation between GDP growth and level or degree of competition. Many empirical studies of select industries in several OECD countries suggest that competition enhances productivity at industry level, generates more employment and lowers consumer prices.
5. The Competition Act follows the philosophy of modern competition laws and prohibits anti-competitive agreements including bid rigging, abuse of dominant position by enterprises and regulates mergers and acquisitions, which cause or are likely to cause an appreciable adverse effect on competition.
6. This law charts a new course, which is aligned with the current economic policy thinking, by promoting competition than by simply curbing monopolies which was previously the position under the MRTP Act. Further,

CCI, unlike the MRTP Commission, is empowered to impose monetary penalties which may extend up to 10% of the turnover of the enterprises. The law is also unique in statutorily mandating competition advocacy by the Commission with the stakeholders.

7. At the outset, I would like to mention that competition law is agnostic and neutral in its application to enterprises and covers public as well as private sectors within its ambit. Thus, the law is applicable to all State owned enterprises and government Departments in respect of their economic activities, barring sovereign functions of the Government.
8. Against this backdrop, let me begin by highlighting the role of competition law in public procurement which constitutes a key economic activity of PSUs and Governments besides having major implications for effectiveness of governance and welfare of citizens. In countries such as ours, where government provision of essential services plays an important role in development, the economic and social significance of public procurement is unquestionable. Public procurement spending triggers a circular investment and income cycle in the economy that also propels job creation, innovation and economic growth.

9. The range of sectors touched by public procurement is as wide as the needs of the government to properly function and deliver services to its citizens for public infrastructure, healthcare, education, transportation, etc. Thus, efficacious and efficient management of public procurement is a non-negotiable priority for any government in order to act in best interest of its citizens in terms of price, quality and service delivery.
10. Second, public procurement is an area where public and private spheres interact. For private enterprises, public procurement is often a crucial component of their businesses, having a significant bearing on their scale of operation, commercial success and competitiveness. Opening and levelling the playing field in procurement markets can allow opportunities for smaller entities, better ideas, and newer innovations.
11. Given the magnitude of public procurement, which is anywhere between 25%-30% of GDP in India, even small savings in public procurement expenditure can create significant fiscal space that can be used for financing development priorities.
12. One key challenge that needs to be necessarily addressed to ensure competitive procurement markets is that of collusive tendering or bid rigging. This essentially refers to a situation where bidders for a

particular contract or tender collude to pre-arrange the outcome of the tender or more specifically to pre-determine the winning bidder. Competition is thereby entirely eliminated or severely circumscribed. This inflates the procurement cost and deprives the public exchequer of value for money.

13. The CCI follows a two-fold approach in combating the menace of bid rigging. Through its enforcement actions, the Commission unearths cartels across several sectors, including public procurement and penalises them. On the other hand, by its advocacy efforts, the CCI sensitises ministries, departments and PSUs to help them make the procurement process competitive and free of any anti-competitive practices.
14. The Commission has been active on the enforcement front in dealing with cases of collusive bidding. Let me share some insights from over a decade of experience of enforcement of Competition Law in India. We have learnt that bidders can give effect to bid rigging in various ways. Some of the most commonly adopted ways are: meeting of minds to submit identical bids or lowest bid or cover bids (voluntarily inflated bids); the competitors may even agree not to bid against each other or set common norms to calculate prices or terms of bids or decide winner in advance on rotational basis or on a geographical or customer allocation basis. The members

of cartel can even limit entry of any outsider or agree not to bid or to withdraw a bid from consideration. Although the ways used by different firms to rig bids vary, they all have one thing in common – the bidders agree to eliminate competition so that prices are higher and the public procurer pays more.

15. Having said that what is equally important to know is that the standards set or the processes followed by public procurers may in certain instances restrict competition or even create conditions conducive for collusion. Unnecessarily rigid eligibility conditions often lead to exclusion of firms thereby limiting the number of potential participants whose inclusion in a bidding process would enable a more competitive outcome.
16. It has further been observed that, since formal rules governing public procurement make communication among rivals easier, they may have unintended consequence of promoting collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process.
17. Another point I would like to highlight is that the procurement policies of some PSUs permit related parties to participate in the bidding process, which invariably results in defeating the objective of competitive bidding. If such participation is to be allowed

then from competition stand point, it becomes imperative for the procuring agencies to ensure that bids submitted by such entities are independently worked out and appropriate firewalls are put in place while participating in the tendering process. Also, small firms have been found to submit bids through common IP addresses besides having common addresses for conducting their businesses. While small players may have to use and share their resources mutually for optimal utilisation, however, in doing so they need to act independently in submitting their bids.

18. Similarly, when it becomes necessary to distribute the works amongst various bidders, PSUs need to ensure that the larger objectives of competitive bidding are not stultified rendering the entire process nugatory.
19. Our public sector has been historically conceived to play a critical role in our economic development and still, in many sectors, they play critical roles besides commanding market power. In this, it becomes obligatory for PSUs with market power to design the contracts in a competition compliant manner and ensure that the contractual conditions are not unfair, failing which, they may potentially subject themselves to rigours of competition law. It would also be useful if a periodic competition assessment of legacy and existing

contracts is undertaken to identify the aberrations. This would help in taking suitable and corrective steps making the enterprise competition compliant.

20. While strict enforcement of competition law is key to deter enterprises from vitiating government tenders, the onus to design and implement procurement systems and tender conditions in a way that encourages competition rests with the procuring agencies. In nutshell, the PSUs need to function keeping in mind the importance of competition in ensuring efficient outcomes.
21. In this regard, Competition Compliance Programme can play a very important role in not only generating a culture of compliance but also in equipping the organisations in avoiding transgression of Competition Act. An effective compliance programme, which is regularly updated to meet the emerging and evolving economic regulation, can be a key to successful corporate governance. A well designed competition compliance programme can be of great benefit to all enterprises irrespective of their size, area of operation, jurisdiction involved, nature of products supplied or services rendered. It should broadly have the following three main objectives: prevention of infringements, promotion of a culture of compliance; and encouraging good corporate citizenship.



22. I am happy to share that CCI has come out with a Competition Compliance Manual for guidance of enterprises. The Manual contains basic principles of competition law that impact an enterprise's relationship with competitors, agents, suppliers, distributors, customers and other third parties. It also provides guidelines that are designed to help businesses distinguish between permissible conduct and anti-competitive behaviour.
  
23. Let me now talk about several other initiatives on advocacy side apart from organising training programmes for the procurement personnel of public enterprises. Based on our enforcement experience, we have published rich advocacy tools and booklets to help stakeholders identify warning signals of bid rigging in tendering process.
  
24. The CCI has designed and published a "**Diagnostic Toolkit: Towards Competitive Tenders**" for public procurement officers. This toolkit is intended to equip officers to review their procurement systems for competition efficiency and take remedial steps, if required. It provides a standardised diagnostic method based on self-assessment by officers involved in public procurement and an implementation guide to improve the quality of tenders. We have noted encouraging

results of its uses from various stakeholders. I urge you to use this toolkit, which is publically available on our website.

25. The Commission recognises the importance of sensitising procurement officials at the grassroot level and the inherent need of 'last mile advocacy'. Therefore, the Commission introduced State Resource Person Scheme (SRPS) whereby CCI has appointed Resource Persons in each State to train State/PSU procurement officials, equip them with fair trade practices and help them design tenders that are fair to all. You may also avail this mechanism for making procurement process competition compliant besides addressing bid rigging.
26. Before I conclude, let me apprise you about one more outreach instrument i.e. sectoral market studies, which is being increasingly deployed, of late, by CCI in pursuing its mandate of fostering competition in the markets. Such studies help gain insights into the structure of various sectors of the market and the business practices prevailing therein. Also, they facilitate in identifying policies, practices and procedures of Governments, Statutory Authorities and PSUs that may have potential to cause adverse effect on competition. These studies cover diverse sectors of the economy, ranging from mining, transport, finance, telecommunications, e-commerce, pharma, etc. As some of these sectors may

have interface with the activities of PSUs, it is imperative that public enterprises actively participate and engage in this process by sharing their experiences and concerns, as and when the market study is undertaken by the Commission. This would go a long way in generating competitive outcomes.

27. With these words, I conclude and once again commend the SCOPE, particularly Shri Sibtiji for taking this initiative which would help PSUs to design their procurement process which is competitive and would help the procurement officers in detecting and reporting cases of bid rigging or cartelisation in the tenders.
28. If any PSU wants to organise a workshop for its procurement officials, the Commission would be happy to provide resource persons, as part of its advocacy mandate which would help the procurement officers in understanding the nuances of the regulatory regime besides the remedies available under the competition law.
29. I wish this event all success and hope that the deliberations would help the PSUs in making their public procurement process more efficient and competitive.

Thank you