

## **Relevance and Applicability of Competition Act 2002**

### ***For Indian Railways***

*Notes taken from talk delivered by Sh G.R Bhatia, Former Additional Director General of Competition Commission of India*

It is inherent in the nature of the human being to compete for betterment and improvement. In fact the scriptures say that healthy and fair competition is the path way to excellence. However, competition puts everyone on their toes and may not be liked by some elements. Even in Kautilya's Arthashastra, there is a mention of formation of Cartel by some element to scuttle competition in business. There is also mentioning of stern punishment by State in olden days on traders found hoarding commercial merchandise. In the famous parable of Eklavya in the epic Mahabharata, Guru Dronocharya asked for the thumb of Eklavya as Guru Dakshina so as to eliminate competition for his favorite disciple Arjuna.

Competition on one hand improves quality and on the other it also enables reduction in prices for the benefit of one and all. Competition has as a transformative agent improves efficiency, promotes innovation and punishes the laggards in the game.. Therefore, healthy competition is a desirable proposition and brings prosperity.

After independence, to promote healthy competition and to check the anti-competition forces from undermining healthy competition in economy, MRTP Act was enacted. However, after the passage of time the provisions of MRTP Act were not 'considered robust enough to ensure all round competition in the growing globalized Indian economy. After initiation of economic reforms in Indian economy, on the recommendation of Raghavan committee Competition Act 2002 was enacted to replace the old MRTP Act. After another amendment in 2007, the Competition Act was finally implemented in the year 2009. The current Competition Act is a very comprehensive and robust piece of legislation. Under the Competition and Antitrust laws, Competition Commission of India (CCI) is empowered to sternly deal with cases of anti competition practices and abuse of dominating position by business units. We have seen in the recent past that CCI has imposed huge penalties for anti competitive behavior by various cement companies and reality major DLF.

As Indian Railways is a seller (service provider) as well as a purchaser, certain provisions of Competition Act apply to Indian Railways. Therefore, the basic understanding of the provisions of Competition Act and rules made there under is imperative for every railway officer. CCI has

recently signed a Memorandum of Understanding with CAG for jointly addressing cases / instances of anti competitive behavior by Vendors in public procurement and other situations involving competition. Now CCI is initiating suomoto cases of scuttling of competition, cartel formation and abuse of dominant position by Trade/Industry based on references sourced from CAG reports.

Under the existing competition and antitrust law, it is the duty of every government functionary to keep CCI informed of all the anti competition practices in public service and procurement, failing which CCI may fix personal responsibility on a Govt Official.

The speaker also talked about Indian Railway Tatkal Ticketing scheme where the passenger has to pay fare from originating station to terminating station irrespective of the place of boarding the train. He further indicated that the practice of hiking up freight by Indian Railway can be questioned by CCI in future. Therefore, it is imperative that any revision of freight should be based on computed verifiable cost data and service wise expenditure incurred.

In public procurement, the incidence of cartel formation is on the increase. It may be noted that in addition to cases of identical rates or similar rate being a clear indicator of cartel formation among the bidders, the crucial point to be seen is whether the bidders participating in a tender are acting in concert or with some prior understanding or there is some discernible pattern in the manner in which rates and other terms and conditions of sale which have been offered by bidders.. In the absence to any documentary evidence, CCI may rely only on circumstantial evidences.

However, CCI in the recent cases has held that government department (as major purchasers and providers of service) are also subject to compliance of competition and antitrust law. The main objective of Competition law is to encourage and enable healthy and transparent competition among the bidders. Accordingly it is essential that the intent of the related policies, administrative directives and technical instructions should be in conformity with the spirit of fair competition embedded in Competition laws and Pronouncements of CCI.

### **Take Away Points**

1. Healthy and Fair Competition is in the interest of all stakeholders and economy.

2. The extant competition laws (replacing the MRTP Act) are more comprehensive, robust and specific to check anti competitive activities by vested interests in fair play of economic forces in market,

3. Recently CCI has levied deterrent punitive penalties on business units found indulging in anti competitive behavior.

4. In addition to same and similar rates conditions quoted acting in concert, premeditative pricing pattern and any other evidence of collusive bidding is the criterion for ascertaining the existence of a Cartel in tender situation.

5. Instances of Cartel formation, Bid rigging, Bid rotation, Cover bid, Bid suppression, Market allocation and abuse of dominant position by bidders in public procurement process should be reported to CCI as per laid down procedure. However, the procurement process need not be held up pending decision of CCI.

6. CCI may levy penalties on vendors, if on enquiry the impugned anti competitive acts are found to have resulted in restriction/ elimination of competition. In addition the Competition Tribunal (COMPAT) may levy additional penalties to compensate the loss suffered by the parties aggrieved by cartel formation. Hence, Railways can seek redressal under the competition laws and get compensation where cartel formation has

resulted into cancellation of tender leading to consequent loss of production in PU, dip in outturn in workshop and poor quality of service in open line operations.

7. Instances of including restrictive clauses in tender conditions, and framing of reference clause or eligibility criterion designed to suit few vendors are anti competitive and may be viewed adversely by CCI.

8. In the commercial matter of Procurement and providing of commercial (Non-sovereign) services the provisions of competition law applies all Govt Dep't.

9. There is need to have a Competition cell appropriately staffed and manned to deal with cases involving competition law matters.

10. There is need to educate, train and sensitize Govt officials on legal provisions of competition laws and related procedural aspects.

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