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UNVEILING BID RIGGING: LEGAL PERSPECTIVES AND ECONOMIC IMPLICATIONS

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ABSTRACT

The concept of competition plays a pivotal role in ensuring that consumers have access to a wide array of goods and services at competitive prices, fostering a healthy market environment. However, anti-competitive practices, particularly cartels and bid rigging, pose significant threats to market fairness and economic efficiency. This article delves into the legal and economic implications of bid rigging, a form of cartel behaviour that involves collusion among bidders to manipulate the outcome of competitive bidding processes. By exploring the definitions, types, and detection methods of bid rigging, this article sheds light on the motivations behind such collusive behavior and its detrimental effects on both developed and developing economies. Through a global lens, the article examines how various jurisdictions, including India, tackle the challenges posed by bid rigging, with a particular focus on the Competition Commission of India's approach and its Leniency Programme. The article emphasizes the importance of distinguishing between pro-competitive and anti-competitive horizontal agreements to better understand and combat the economic and legal challenges presented by bid rigging.

1. Introduction

The term 'competition' carries various meanings depending on the context. The Competition Commission of India refers to competition as "the best means of ensuring that the 'Common Man' or 'Aam Aadmi' has access to the broadest range of goods and services at the most competitive prices." The term competition has not been explicitly defined anywhere in the Competition Act, 2002, but in the corporate world, it is generally understood as a process where companies compete to attract and retain customers, often by eliminating rivals by deploying various methods. It is important to note that competition is not good for the business, but it is good for the consumer, and it is a basic tenet of capitalism. Without legitimate competition, a business has too much power over the market, and the market is no longer "free". From an

economist's viewpoint, competition is characterized by the rivalry between businesses as they vie for customers by minimizing costs and prices creating new products or services, or leveraging specific strengths, skills, or other advantages to better meet customer needs compared to their competitors.¹

Anti-competitive practices are actions taken by businesses or organizations to unfairly dominate the market. These actions disrupt fair competition and manipulate market conditions to maintain a superior market position. Anti-competitive behaviour employed by businesses and governments seeks to reduce competition within markets enabling monopolies and dominant firms to earn excessive profits and hinder new competitors. Due to its significant impact on the market, this behaviour is heavily regulated and subject to legal penalties. There are two primary types of anti-competitive practices. The first type, horizontal agreements, involves anti-competitive activities among competitors at the same level of the supply chain, such as mergers, cartels, collusion, price-fixing, price discrimination, and predatory pricing. The second type, vertical agreements, concerns restrictive practices between firms at different levels of the supply chain, such as those between suppliers and distributors. These practices include exclusive dealing, refusal to deal or sell, and resale price maintenance.

However, it is important to note that not all the horizontal agreements are detrimental to competition. Some horizontal agreements can yield significant benefits by enhancing efficiencies, reducing risks, facilitating the creation of new or improved products or methods of distribution, and improving information flow, which can collectively enhance the competitive functioning of a market. It is therefore crucial to distinguish between horizontal agreements that have pro-competitive effects and those that are anti-competitive².

A cartel is a type of horizontal agreement. It is an intentional arrangement aimed at reducing competition. Section 2(c) of The Competition Act, 2002 defines 'cartel' as follows:

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

¹ Safeway Plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets Plc; J.Sainsbury Plc; and Tesco Plc, A Report on the Mergers in Contemplation, para 2.88

² Dr. Versha Vahini, Textbook on Indian Competition Law 54 (Lexis Nexis 2020)

2. Understanding Cartels: Definition and its Types

“There are certain agreements or practices which, because of their pernicious effects on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal without any elaborate enquiry as to the precise harm they have caused or the business excuse for their use.”³ Cartels fall into the category of pernicious agreements that can significantly damage both consumers and the overall economy.

It entails competitors engaging in unfair practices like price collusion, thereby resulting into reduced choices for consumers. Cartelization has an adverse impact on the overall competitive structure in the market and it also leads to distortion of prices that is why cartels are subjected to the highest penalty under The Competition Act, 2002.⁴ The Supreme Court of India in the case of *Union of India v Hindustan Development Corporation* observed that a cartel “is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly.”⁵ After the removal of competition in the market thereby creating the condition of monopoly, the cartel of businessman tries to increase their own profits by increasing the prices of the goods or reducing their output leading to a condition of scarcity for raising prices of the goods. Therefore, to sum it up we can say that the direct effect of a cartel is that the consumers are forced to pay more for goods and services than they would’ve otherwise paid in an efficient competitive market.

Cartels can be classified into different types starting from:

- **International cartels:** These are the cartels operating across national boundaries and involve producers, manufacturers, sellers, distributors, traders, or service providers from various countries who collaborate to limit competition in multiple markets. The classical example of an international cartel is the Organization of the Petroleum Exporting Countries (OPEC).
- **Domestic cartels:** Domestic cartels are agreements between competing firms within one country, affecting national industries. These agreements can be made by either private or public enterprises within the same industry.
- **Export Cartel:** Export cartels involve domestic firms colluding on strategies beneficial for exporting products. Such cartels often receive exemptions from competition laws.

³ *Northern Pacific Railway Co. v United States*, 356 U.S. 1(1958)

⁴ The Competition Act, 2002, § 27(b), No. 12, Acts of Parliament, 2003 (India)

⁵ *Union of India v Hindustan Development Corporation*, 6(1994) CTJ 270 (SC) (MRTP)

- **Import Cartel:** Import cartels involve domestic firms colluding on import strategies, such as limiting imports or setting purchase terms. These are typically prohibited by competition laws.
- **Rebate Cartel:** Rebate cartels involve competitors agreeing on standardized rebate strategies for customers.
- **Hub and Spoke Cartel:** Hub and spoke cartels involve a third-party facilitating collusion between competitors, commonly seen in US and UK but not covered by Indian competition law.

The cartel conduct can be further classified into 4 types i.e. price fixing, market sharing, output controls/limiting production, and bid rigging.⁶

3. Decoding Bid Rigging: What It Is and How It Works

To understand bid rigging, we need to first understand the terms “bid” and “rigging.” “Bid” means ‘an offer to give for an article about to be sold on auction’⁷ and ‘rig’ ‘means to manage or conduct fraudulently so as to gain an advantage.’⁸ The Organisation for Economic Co-operation and Development (OECD) defines bid rigging as “Bid rigging occurs when firms collude and conspire to raise prices or lower the quality of goods and services for purchasers who wish to acquire products or services through a bidding process.”⁹ According to the European Commission, “Bid rigging is a specific form of collusion where companies agree among themselves on the bids they will submit in response to a tender, thereby distorting the bidding process.”¹⁰

Connor has defined bid rigging as “a manipulative strategy employed by firms where they conspire to decide in advance who will win a bid and at what price, undermining competitive market processes.”¹¹

In simple terms, bid rigging or collusive bidding is a process that occurs when two or more competitors have an agreement that they will not compete with each other in the bidding for particular tenders. The participants who are the part of these agreements may take turns and be

⁶ The Competition Act, 2002, § 3(3), No. 12, Acts of Parliament, 2003 (India)

⁷ I Y V Chandrachud, P. Ramanatha Aiyer’s Advanced Law Lexicon 525 (Wadhwa and Company 2007)

⁸ Concise Oxford English Dictionary, 1238 (Oxford University Press, Oxford, 11th Edition., 2004)

⁹ Guidelines for Fighting Bid Rigging in Public Procurement, <https://www.oecd.org/competition/guidelinesforfightingbidrigginginpublicprocurement.htm> (last visited on May 15, 2024)

¹⁰ European Commission, Cartels https://competition-policy.ec.europa.eu/antitrust-and-cartels_en (last visited on May 15, 2024)

¹¹ John M. Connor, Studies in Industrial Organization Global Price Fixing (2nd ed. 2008)

the winner on different occasions or they can act as subcontractors for the winner of the bid.

The terms of the agreement regarding the tenderer's winning bid might include that the bid must be the lowest among all submitted bids or the only one with acceptable terms. Additionally, it could be the only bid submitted, indicating that no other participants entered the tender process.¹²

Bid rigging is a fraud upon the agency, which is seeking the bids, and upon the public who ultimately bear the costs as taxpayers or consumers. It always results in higher prices and is beneficial to the contractors as everything is stage managed by them.

4. Different Forms of Bid Rigging

Bid rigging can manifest in various ways, but most conspiracies typically fit into one or more of the following categories:

- **Bid Suppression:** Bid suppression agreements are those agreements wherein one or more companies agree not to bid or to withdraw a previously submitted bid, ensuring that the chosen winner's bid is accepted. The competitors come to an agreement about which contracts each participant will submit bids for and which ones they will avoid bidding on. For instance, a buyer might request bids from three suppliers A, B&C, but bidders B and C may opt not to submit a bid. In the next round, bidders A and C might refuse to bid. This form of collusion is quite obvious, and it's more probable that bidders A and C would place bids, but with terms so unfavorable that only bidder B's proposal would be acceptable to the buyer.
- **Complementary Bidding:** It is also known as courtesy bidding, cover bidding, token bidding, or symbolic bidding. It happens when bidders submit uncompetitive or irregular bids intentionally to let the other conspirator win the contract. For example, these cover bids might feature prices that are less competitive than those of the chosen winner, or they might include terms that the bidders are aware will be unacceptable to the agency soliciting the bids. Typically, this is followed by the designated "winner" making monetary payments to the designated "losers" as a form of compensation. Complementary bidding schemes are the most common types of bid rigging. They deceive buyers by giving the illusion of competition while covertly increasing prices.

¹² United States v Misle Bus & Equipment Co., 967 F.2d 1227

- **Bid Rotation:** In bid-rotation, participating companies still submit bids but conspire to rotate the position of the lowest, winning bid amongst themselves. The implementation of these agreements can differ; for instance, firms may agree to distribute a roughly equal value of contracts from a specific set, or they might divide the contracts in a way that reflects each firm's size.
- **Subcontracting:** Subcontracting deals often play a role in bid-rigging conspiracies. Competitors who decide not to place a bid or who intentionally submit a higher bid may, in return, secure subcontracts or supply agreements from the bidder who wins with the lowest bid. In certain variations of these schemes, the initial low bidder might agree to retract their bid to let the following lowest bidder win, in exchange for a profitable subcontract that allows them to share in the illicitly elevated price. This can be clearly understood with the help of the following example: Let us suppose Three construction companies bid to build a bridge that a government wants to build. The cost of the bridge would normally be Rs 100 Crores, but the bidding companies enter into an agreement for collusive bidding. Company A bids Rs 215 Crores, Company B bids Rs 215 Crores, Company C bids Rs 200 Crores. Due to the bids being fairly close to each other the government thinks if it allocates the work to Company C then it will get a good deal. Company C then hires Company A and B as subcontractors to build the bridge and they all share the Rs 200 Crores between them. The government (the general public) has paid Rs100 Crores too much for the bridge.
- **Market Allocation:** In this, competitors divide the market among themselves, establishing agreements to avoid competing for particular customers or within specified regions. For instance, they may assign certain customers or customer categories exclusively to specific firms. As part of the agreement, these firms agree to avoid submitting competitive bids or only place nominal bids for contracts from customers assigned to another firm. Correspondingly, that firm will also refrain from bidding competitively on customers designated to others in the pact.

5. What drives Collusion: Key Factors

There are three broad factors in a market which makes it easier for the firms to collude. The foremost being the elasticity of demand. The second factor is how competitive a market is. In case of fierce competition in the market, the prices are lower; in such situation, the greater

would be the benefits from collusion. Finally, the third factor is the barriers to entry in a market. If there are high barriers to entry or expansion in a given market and market is not open for new players or expansion of capacity by existing players, it will be easy to sustain collusion. Market concentration refers to the proportion of an industry's production, controlled by a few firms that is to say when just few businesses produce most of an industry's goods. When the market is dominated by a few players, it can be easier to get together secretly and agree on prices, especially when there are no small businesses around to disrupt things.

Businesses selling similar or homogeneous products, sharing similar cost structures and efficiency levels, are also to be more likely to lean towards collusion. Homogenous products and same quality products are easier to collude on, as their similarities drive focus solely on pricing.¹³ A similar cost structure and efficiency level reduces conflicts arising from price setting, making collusion more feasible.

Excessive capacity is detrimental to collusion. Firms that can produce more than they currently need have incentives to cheat by undercutting competitors. However, in markets with little to no excess capacity, firms are less likely to cheat, which leads to collusion.¹⁴

Market transparency with respect to prices and sales terms, frequent interactions among competitors and institutional links between firms also pave the way for collusion. Transparent markets allow firms to keep an eye on each other and detect deviations from collusive agreements, while frequent interactions and institutional links create bonds, encouraging collusion.

If consumers heavily rely on a product, regardless of price, and if the product doesn't change much over time, then the chances of businesses agreeing on prices increases. When consumers depend heavily on a product and demand is inelastic, firms have a greater chance to charge higher prices. More customers and slower technological advancements make it easier to maintain collusion due to the to the huge customer base and less pressure to innovate.

¹³ 1 George J. Stigler, "A Theory of Oligopoly", in Margaret C. Levenstein and Stephen W. Salant (eds.), *Cartels* 80 (Edward Elgar Publishing Limited, 2007)

¹⁴ Carl Davidson and Raymond Deneckere, "Excess Capacity and Collusion", 31(3) *IER* 521, 525 (1990), https://www.jstor.org/stable/2527159?read-now=1&seq=5#page_scan_tab_contents

The history of collusion, active trade associations, and the degree of rivalry are also influencing factors. Industries which have colluded in the past are more likely to repeat that behaviour in the future. Active trade associations, though useful for setting standards and growing the industry, can unfortunately also serve as hubs for collusion. Lower degrees of rivalry increase the chances of collusion.¹⁵

Markets with well-established technologies and where setting up a business is expensive, are more prone to collusion. Established technologies limit innovation opportunities, making collusion easier. Expensive setup costs act as entry barriers, limiting competition and creating a favourable environment for collusion.

The absence of a buyer's power or practices also increases collusion prospects. If buyers have less influence or customer groups don't work actively, then collusion is more likely. Also, when the chances of getting caught and penalized are low, it's easier for firms to agree on prices. Factors such as stable demand and supply, and links between firms like joint ownership or licensing, help sustain these collusions as they reduce risks and improve predictability.

6. The Impact of Bid Rigging

In competitive markets, companies are focused on producing as much as possible to maximize their profits. In such markets, there are a lot of businesses and customers, and no single entity owns a major share of the market. On the other hand, in a monopoly, a single business rules the market. Here, the seller recognizes that the higher its output, the lower will be the price, which it can charge; he therefore adjusts output and price to maximise his return. However, it's worth noting that perfect competition and monopolies are rare in real life. It is an oligopoly, which persists mostly. In oligopoly, there are only a small number of businesses which are present, and they have a significant impact on each other. Therefore, in forming plans about production and pricing, these businesses have to consider the reaction of their competitors. The theory suggests that such businesses focus mostly on making forecasts and coordinating efforts. In certain scenarios, these businesses cooperate and agree on a game plan regarding production and costs, similar to the way a monopolist would. As a result, the overall output of the industry decreases, which in turn would shoot the prices, resulting in higher industry-wide and firm-wise profit. In essence, when competitors collude, they act like a monopoly and aim to make

¹⁵ Competition Commission of India, Provisions relating to Cartels, 7 https://cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-cartel1652176944.pdf

as much profit as a monopoly would. Upon collusion, the ideal product amount and price move to the levels seen in a monopoly; so, the collusion produces an output where marginal cost is equal to marginal revenue, however, price is much higher. During collusion, the price exceeds the competitive level, and each member essentially finds themselves in the same condition as a monopolist. So, in simpler terms, when companies work together in a market to determine output and pricing, they can manipulate the market like a monopoly, leading to higher prices and profits.

6.1.Economic Detriments of Bid Rigging

Bid rigging causes significant harm to the economy as it often leads to higher prices for goods and services. The people who make the bids most of the time end up paying more than they normally would and as a result, this extra cost is borne by the consumers. Studies suggest that bid rigging can inflate the price of a service or product by more than 10%.¹⁶ The high cost of bid rigging leaves the buyer with less money for other needs.

In some cases, the person winning the bid has to give some sort of payment (money or work) to those who didn't win as a part of a prior agreement between them. To make up for this loss, they may then raise prices, increase charge for labor and materials, or compromise with the quality or quantity.¹⁷ Bid rigging also has a detrimental effect on business competition. It leads to the targeting and removal of local and international competition, which ends up slowing down economic growth. Furthermore, bid rigging prevents qualified bidders from competing, which may lead to reduction in quality standards. While there may be situations where bid rigging doesn't result in higher prices or lower efficiency, it still hurts in the long run by preventing competition and barring new entrants from participating. Bid rigging, specifically bid rotation in a collusion, can sometimes result in the best producer at the moment getting the bid. But even then, this lack of competition and exclusion of new companies can lead to negative impacts in the long run, especially when it comes to repeat purchases. Bid rigging is also often used in anti-competitive ways by international groups. In some parts of the world where a few companies rule local markets, bid-rigging groups are widespread and significantly increase prices.¹⁸ An estimate of the harm caused by such cartels exceeds billions of dollars

¹⁶ US Department of Justice, <http://www.usdoj.gov> (last visited on May 22, 2024)

¹⁷ The World Bank Group, Annual Report on Investigations and Sanctions of Staff Misconduct and Fraud and Corruption

in Bank-Financed Projects, 2004, <https://documents.worldbank.org/en> (last visited on May 22,2024)

¹⁸ Kramer Michael, Combating Corruption and Fraud in International Projects, 2000,

per year. Although it's hard to precisely measure the damage caused only by bid rigging, this rough calculation hints at the considerable damage it does to the economy.

6.2. Impact on developing countries

Sometimes governments may allocate a huge amount of money for public work projects with the goal of making specific social and economic changes. Bid rigging negatively impacts these public projects by making everything more expensive and disrupting the distribution of resources. This interferes with the funding for other projects. The wasting of resources in such a way hinders the effectiveness of development initiatives. Given the type of the projects involved, the low quality of work often linked with bid rigging affects the entire community. Moreover, it also negatively impacts the poor in particular since many projects are conceptualised for their exclusive benefit. When developing countries lose development bank funds due to practices such as bid rigging, the taxpayers of these countries are still obligated to repay the development banks. Therefore, not only are the less fortunate deprived of the potential benefits of development projects but at the same time, they are also forced to repay the resultant debts to these banks.¹⁹

Developing countries are prone to risks of bid-rigging due to their frequent engagement in government procurement, lack of a strong legal and regulatory framework for antitrust enforcement, and general absence of awareness. Moreover, these nations often don't have the means to carry out large projects by themselves and need to solicit bids from foreign companies. In addition, developing countries often seek bids for imports from more developed nations. When these international deals involve bid rigging, governments in these poorer countries have a hard time taking effective action. This difficulty arises not just because their law enforcement is weaker, but also because of the political power dynamics.

It's especially tough when the companies involved in the bid rigging are from wealthier countries.

www.wmkramer.com/3combat.html (last visited on May 22,2024)

¹⁹ Ravindran Pratap, Projecting Corruption in Multilateral Banks, The Hindu Business Line, Internet Edition, January 22, 2004, <http://www.blonnet.com> (last visited on May 23, 2024)

7. How the Competition Commission of India addresses Bid Rigging

Administrative enforcement authority under the Competition Act, 2002 rests with the Competition Commission of India (CCI), which has sole jurisdiction to investigate and adjudicate. Section 18 of the Act casts a primary duty on the Commission to achieve the objectives of the Act which means that the Commission is accountable for successful implementation of the Act. Certain CCI orders, including those imposing penalties, finding infringements as well as closing inquiries, can be appealed first, before the NCLAT, and then on to the Supreme Court.

The CCI is vested with significant powers to investigate, adjudicate, and dispose of a case, and sanction infringements of the Act which are discussed herein below:

Inquiry into bid rigging (Section 19)

As per Section 19 of The Competition Act, 2002 the commission may inquire into any alleged contravention of the provision of Section 3(1) either by taking suo moto cognizance or on receipt of any information accompanied by a prescribed fee²⁰ from any person, consumer, or consumer association or trade association or by any reference made to it by the central or state government.²¹

Procedure of Inquiry under Section 19 (Section 26)

On receipt of information or on its knowledge, if the commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.²² The Director General is required to submit a report on his findings within the period specified by the Commission.²³ However, if the Commission believes that there exists no prima facie case, it shall close the matter forthwith and pass the order as it deems fit.

If the report submitted by the Director General reveals contravention of the

Power to issue directions (Section 27)

Section 27 of the Act empowers the Commission to pass inter-alia any or all of the following orders:

²⁰ The Competition Commission of India (General) Regulations, Regulation 49, No. 2, 2009 (India)

²¹ The Competition Act, 2002, § 19(1), No. 12, Acts of Parliament, 2003 (India)

²² The Competition Act, 2002, § 26(1), No. 12, Acts of Parliament, 2003 (India)

²³ The Competition Act, 2002, § 26(3), No. 12, Acts of Parliament, 2003 (India)

- a) direct the erring parties to discontinue and not to re-enter into such agreement;
- b) direct the erring parties to modify the agreement;
- c) impose a penalty on erring parties;
- d) direct the erring enterprises to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- e) pass such other orders or issue such directions as the Commission may deem fit.

Power to Impose Penalty

If the Commission finds that any agreement is in contravention of the provisions contained in Section 3 of the Act, it can impose penalty up to ten percent of the average turnover for the last three preceding financial years upon each of such persons or enterprises that are parties to bid rigging.²⁴ The Commission can impose on each member of a cartel or each of such persons or enterprises that are party to an anti-competitive agreement including bid rigging or collusive bidding, a penalty of up to three times its profit for each year of the continuance of such agreement, or ten percent of the turnover for all years during the continuance of such agreement, whichever is higher.²⁵

If any person, without any reasonable cause, fails to comply with directions of Commission and Director General, the CCI may impose a fine extending up to rupees one lakh for each day during which such non-compliance occurs to a maximum of rupees one crore, as may be determined by CCI.²⁶

Power to Issue Interim Orders (Section 33)

Upon satisfaction that an act in contravention with Section 3(3) has been committed or about to be committed, the Commission may issue an order, to restrain any party temporarily from carrying on anti-competitive act until the conclusion of inquiry of bid rigging or until further orders, without giving notice to such party where it deems necessary.²⁷ However, the Commission has to hear the party against whom such an interim order has been made as soon as possible. Further, the Commission has to pass a final order within ninety days from the date of an interim order.²⁸

²⁴ The Competition Act, 2002, § 27(b), No. 12, Acts of Parliament, 2003 (India)

²⁵ The Competition Act, 2002, § 27(b) Proviso, No. 12, Acts of Parliament, 2003 (India)

²⁶ The Competition Act, 2002, § 43, No. 12, Acts of Parliament, 2003 (India)

²⁷ The Competition Act, 2002, § 33, No. 12, Acts of Parliament, 2003 (India)

²⁸ The Competition Commission of India (General) Regulations, Regulation 31, No. 2, 2009 (India)

In the case of *Competition Commission of India v. Steel Authority of India Limited*²⁹, the Supreme Court held that while recording a reasoned order under Section 33 of the Act, the Commission should, inter alia, ensure fulfillment of the following conditions: —a) *record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; b) it is necessary to issue order of restraint; and c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.* It was also observed that the power to pass temporary restraint order can only be exercised by the Commission when it has formed prima facie opinion and directed investigation in terms of section 26(1) of the Act.

8. APPEALS

Section 53A provides the National Company Law Appellate Tribunal, established under Section 410 of the Companies Act, 2013 to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.³⁰ An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.³¹

8.1. Leniency Programme

Leniency has been an effective tool for regulators worldwide. Regulators opt for such “leniency” due to the extremely secret nature of cartels where it is challenging to get evidence. Section 46 of the Competition Act read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 governs the law on leniency concerning cartel and bid rigging in India.

Section 46 of the Act provides that if any enterprise included in any cartel, which has allegedly violated the provisions of Section 3(3) of the Act, has made a complete, true, and vital disclosure in respect of alleged violations, the Commission may impose upon such enterprise a lesser penalty. The CCI is empowered to grant a reduction in penalty of up to 100 percent to

²⁹ Competition Commission of India v Steel Authority of India Ltd., (2010)10 SCC 744

³⁰ The Competition Act, 2002, § 53A, No. 12, Acts of Parliament, 2003 (India)

³¹ The Competition Act, 2002, § 53B (2), No. 12, Acts of Parliament, 2003 (India)

the first leniency applicant, up to 50 percent to the second leniency applicant, and up to 30 percent to any subsequent leniency applicant, if the applicant provides additional valuable information that was previously unknown to the CCI.

According to a study conducted by CCI, from 2009 through 2018, only seven leniency applications were received by it. The first application of the leniency regime was filed after five years of its adoption in the case of *Brushless DC Fans*³². One of the parties filed a leniency application and received a partial waiver of 75% in penalty. In *Sports Broadcasters*, the CCI granted 100% immunity to Globecast India Private Limited and its employees, who were engaged in bid-rigging with Essel Shyam Communication Limited (ESCL). Globecast was granted total immunity based on vital evidence that disclosed the *modus operandi* of the cartel, the role of ex-employees, e-mail correspondence, etc. ESCL filed a leniency application during the pendency of the investigation and received a 30% reduction in penalty.

The disparity in the implementation of the leniency policy and the low turnout in the number of applications led to the introduction of the Competition Commission of India (Lesser Penalty) Regulations, 2024 hereinafter referred to as LPR 2024. LPR 2024 has introduced the 'lesser penalty plus' facility wherein a leniency applicant of an existing cartel (Existing Applicant) is incentivized to disclose details of collusive conduct that is unrelated to the existing cartel and not yet known to the CCI. The Existing Applicant availing Leniency Plus Facility will have the following benefits:

- (1) an additional penalty reduction of up to or equal to 30 percent, namely a further reduction on the penalty imposed in the first cartel; and
- (2) being eligible for up to or equal to 100 percent penalty reduction in the newly disclosed cartel.

LPR 2024 clarifies that Leniency Plus benefits will be granted only to the first applicant unless the CCI rejects their application. The CCI will, however, before rejection grant an opportunity for a hearing. It has also introduced the option for leniency or Leniency Plus applicants to withdraw their applications before the DG submits the investigation report to the CCI. However, the information and evidence submitted by the applicant (except the admission of guilt by the applicant) before withdrawing, can be used by the DG and CCI in the proceedings. It also requires all leniency and Leniency Plus applications to be made in writing earlier, as

³² *Brushless DC Fans*, Suo Moto Case No. 03 of 2014

opposed to oral applications, which were permitted earlier.

9. Legal Precedents on Bid Rigging

The CCI's decisional practice elucidates that there is a presumption that agreements under Section 3(3) will have an AAEC and thus, there is no further need to prove an AAEC.³³ However, it is a rebuttable presumption and the onus is on the enterprise that is facing allegations of bid rigging to rebut this presumption. In *Rajasthan Cylinders*, the Supreme Court of India (Supreme Court) stated that the standard of proof required to establish cartelisation is that of probability. In *Western Coalfields*, the CCI noted that “*proceedings under the Act in [the] context of anti-competitive agreements, including bid-rigging, do not involve criminal punishments but only monetary penalties.*”

Hence, the standard of proof of “beyond reasonable doubt” which is relevant in criminal proceedings cannot be made applicable to CCI proceedings. Accordingly, the CCI evaluates the sufficiency of evidence on the benchmark of “preponderance of probabilities.”

The Supreme Court's decision in **Rajasthan Cylinders v. Union of India**³⁴, marks the first instance where the market structure was considered to determine a contravention of the Act. In this case, the appellants were suppliers of LPG cylinders to Indian Oil Corporation Limited (IOCL), HPCL, and BPCL. It was alleged that the appellants indulged in bid rigging by quoting the same prices in their bids. The Director General after analyzing the bids concluded that there was not only a similarity of pattern in the price bids submitted by the 50 bidders for making supply to the IOCL but discerned a pattern wherein parties submitted their bids in various states at the identical level which demonstrated price parallelism. Based on these findings, the Competition Commission of India (CCI) confirmed the allegation of bid rigging. Competition Appellate Tribunal (COMPAT) upheld these findings and imposed severe penalties under Section 27 of the Act.

The issue was thus whether there was any collusive agreement between the participating bidders which directly or indirectly resulted in bid rigging of the tender floated by IOCL in March 2010.

³³Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television & Ors., (2017) 5 SCC 17

³⁴ Rajasthan Cylinders v Union of India, 2020 16 SCC 615

The Supreme Court held that the first and foremost step is to determine the market situation whether there was monopsony or oligopsony. Monopsony consists of a market with a single buyer while in the case of oligopsony, there are few buyers in the market who have the power to control the prices of the goods being sold by the seller. In such situations, the onus of anti-competitive behaviour cannot be placed solely on the seller to mark him as an offender. The Court based its decision on the European Court's ruling in *Imperial Chemical Industries Ltd. v. Commission of European Communities*³⁵, which was upheld in the case of *Excel Crop Care Limited* that in an oligopolistic market, the competitors are aware of one other's presence and so, to survive in the market they have to match each other's marketing strategy. This is one of the plausible reasons that in such a market, the prices of competitors are almost similar. Although parallel pricing in an oligopolistic market may provide strong evidence of a concerted practice, it is not conclusive. The same test was reiterated by the Supreme Court of the United States in *Monsanto Company v. Spray-Rite Service Corpn*³⁶. The Apex Court thus set aside the order of the above authorities and therefore, the Supreme Court's decision in this case marks the first instance where the market structure was considered to determine a contravention of the Act.

XYZ v. Hindalco Industries Ltd and Another³⁷: In this case, the informant revealed that the two enterprises, namely Hindalco Industries Limited and Vedanta Limited, were engaged in bid rigging/collusive tendering which is a violation of Section 3(1) read with Section 3(3)(a), Section 3(3)(c) and Section 3(3)(d) of the Competition Act, 2002. It was alleged that the opposite parties issue their price circulars to buyers almost simultaneously and give discounts to their customers after discussions between them to maintain parity in the market. It was further alleged that the additional charges mentioned in their price circulars remain almost identical and they have also carved out certain customers amongst themselves.

The Commission observed that "*price-parallelism is insufficient to order a probe in the absence of any documentary/oral evidence on record from which collusion or concert between the parties can be inferred.*" The Informant failed to substantiate the allegations made in the Information and therefore, the commission finds no case of contravention of Section 3 of the Act in the instant case.

³⁵ *Imperial Chemical Industries Ltd. v Commission of European Communities*, 1972 ECR 619 (ECJ)

³⁶ *Monsanto Company v Spray-Rite Service Corpn.*, 1984 SCC OnLine US SC 56

³⁷ *XYZ v Hindalco Industries Ltd. and Anr.*, 2020 SCC OnLine CCI 39

Chief Material Manager, North Indian Railways v. Bic Auto Pvt Ltd.³⁸: In this case, five references were filed alleging that the opposite parties had violated Section 3 of The Competition Act, 2002, where the other party functioned as a cartel and indulged themselves in bid-rigging. The parties used to bid for similar prices and held control over the bids offered by the railway authorities. The DG during the investigation found that one of the employees of OP-1 used to keep the records of the allocation of tender quantities amongst the Opposite Parties, which were modified over time according to the inputs received, and the opposite parties used to exchange screenshots of their financial bids to ensure quoting of pre-decided prices. The Commission observed that the e-mails and other evidence collected by the DG revealed the *modus operandi* of the cartel and held that “*merely putting emphasis on market conditions in isolation ignoring the actual conduct in the teeth of overwhelming evidence meticulously pieced together by the DG, the parties have been selective in projecting their submissions. Further, as a consumer, the Indian Railways is free to make a choice as far as selection of goods or services provider is concerned. This has to be also considered in view of direct accrual of benefits to the consumer i.e. the Government of India and the passengers using railway services. Negotiating terms and conditions with the opposite parties to procure CBB on the best possible bargain price amounts to nothing but ensuring benefit to itself and its end consumers i.e. railway passengers. Therefore, the Indian Railways cannot allow the opposite parties to fix any arbitrary prices and/or quantities.*” The Commission also opined that the opposing parties had no substantial evidence in their defense. Therefore, the opposite parties were held liable for the contravention of the provisions concerning the anti-competitive agreements under the Act.

Excel Crop Care Ltd v. Competition Commission of India and Ors³⁹ In this case, the chairman of the Food Corporation of India wrote a letter to the Competition Commission of India complaining that four companies namely M/s Excel Crop Care, M/s United Phosphorus Limited, M/s Sandhya Organics Chemicals Private Limited, and M/s Agrosynth Chemicals Limited had come into an anti-competitive agreement in relation with the tenders issued for the APT by the FCI. It was stated that similar bids were quoted for the past eight years. Upon investigation, the DG found prima facie evidence of bid-rigging leading to monopolistic behavior. The Commission, along with the Appellate Tribunals, held the manufacturers of APT guilty under Section 3 of the Act. An appeal was made to the Apex Court wherein the court

³⁸ Chief Material Manager, Northern India Railways v Bic Auto Pvt. Ltd., 2020 SCC OnLine CCI 28

³⁹ Excel Crop Care Ltd. v Competition Commission of India and Ors, (2017) 8 SCC 47

observed that the dispute of the Appellants that equivalent pricing in an Oligopoly market by itself did not amount to a breach of the Competition Act does not hold much water, as there are numerous incidents of identical priced bids being submitted, despite the varying price of manufacture of every bidder. Supreme Court also drew attention to the concerted withdrawal of bidding in 2011 by all the Opposite Parties. The Supreme Court referred to the case of *CCI v. Coordination Committee of West Bengal Cine Artists* to hold that no written proof of an anti-competitive agreement needs to be there before action can be taken against the defaulting party. Reference was also made to the observations of Lord Denning in *Registrar of Restrictive Trade Agreements vs. WH Smith & Sons - "People who form a Cartel do not shout from the rooftops. They make their arrangements in a cellar and go about their business quietly. Even a nod or a wink will do"*.

The Supreme Court, further, clarified that penalty should be determined based on the “relevant turnover” of the enterprise. The term relevant turnover of the company refers to the turnover relating to product/service, in respect of which the contravention took place, and not the “total turnover” of the company covering all its products.

Western Coal Fields Ltd. v. SSV Coal Carriers Pvt Ltd.⁴⁰: In this case the Informant, Western Coalfields Limited, had approached the Competition Commission of India (Commission) alleging bid-rigging by SSV Coal Carriers Private Limited, M/s Bimal Kumar Khandelwal, M/s Pravin Transport, M/s Khandelwal Transport, M/s Khandelwal Earth Movers, M/s Khanduja Coal Transport Co., M/s Punya Coal Road Lines, M/s B. Himmatlal Agrawal, M/s Punjab Transport Co. and Avaneesh Logistics Private Limited, upon noticing identical price quotes given by them in four tenders. The Commission observed that there was repeated quoting of identical prices for dissimilar bids which was highly susceptible. The coal transporters had formed a cartel in which they admitted that the prices were already benchmarked against earlier prices and also had business dealings with each other. In its order, the Commission noted that such conduct in public procurement besides defeating the tendering process has an adverse impact on the competition process, causing deprivation of efficient outcomes that would have followed otherwise. The Commission has held the said parties to be in contravention of the provisions of Section 3(3)(d) of the Act.

⁴⁰ Western Coal Fields Ltd. v SSV Coal Carriers Pvt. Ltd., 2017 CCI 0795

10. Conclusion

Competition keeps markets efficient and innovative. It encourages new ideas, makes sure prices are fair, enhances quality, and allows for a wider variety of options for customers. However, anti-competitive practices such as bid rigging and cartels severely compromise this leading to steep prices, limited options for consumers, and economic slump. To combat this, many countries worldwide, including India, have implemented strict laws and regulatory bodies like the Competition Commission of India. These bodies conduct rigorous investigations, impose significant penalties, and offer leniency programs to combat these practices. While progress has been made, efforts to tackle unfair competition aren't over. We need continued surveillance, strict management, and a deep understanding of market structures to maintain fair competition.

Further, enhancing public awareness and cooperation between international competition authorities will also be key in addressing this issue. A frequently mentioned approach is the leniency program which encourages companies involved in anti-competitive practices to come forward in exchange for reduced penalties. This program has found varying degrees of success globally and forms an essential part of regulatory strategies. It helps in uncovering complex cartels and is also a key tool in dismantling hidden networks. While tougher sanctions are needed to deter anti-competitive practices, the focus should also be on promoting a culture of competition and encouraging more businesses to come forward under the leniency program.

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