

# Competition, Procurement & Compliance

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Disclaimer: Views expressed during this Presentation are personal and do not necessarily reflect those of CCI.

# Agenda

- Competition
- Public Procurement
- Competition Compliance

**“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently.” – Warren Buffett**

# Introduction

## Competition

- Economic Efficiency
- Allocative Efficiency
- Productive efficiency

'Competition is good for consumers for the simple reason that it compels producers to offer better deals - lower prices, better quality, new products, and more choice' - **John Vickers**

# Competition – is not an automatic process

- Markets are prone to distortion by market players
  - By Suppliers
  - By Buyers
  - And by intermediaries
- Information Asymmetry, Seasonal Variations in production and Demand and Trade Barriers impinge on competition
- Government regulation also sometimes impinge on free-markets

# The Competition Act, 2002

- **Preamble** :In view of the economic development of the country
  - to prevent practices having an adverse effect on competition;
  - To promote and sustain competition in markets;
  - To protect the interest of consumers; and
  - To ensure freedom of trade carried on by other participants in markets, in India
- Enforcement – Anti-Competitive Agreements (S3), Abuse of Dominance (S4) & Regulation of Combinations (S 5 & 6)
- Advocacy – Reference (S 49, S21, S21A)

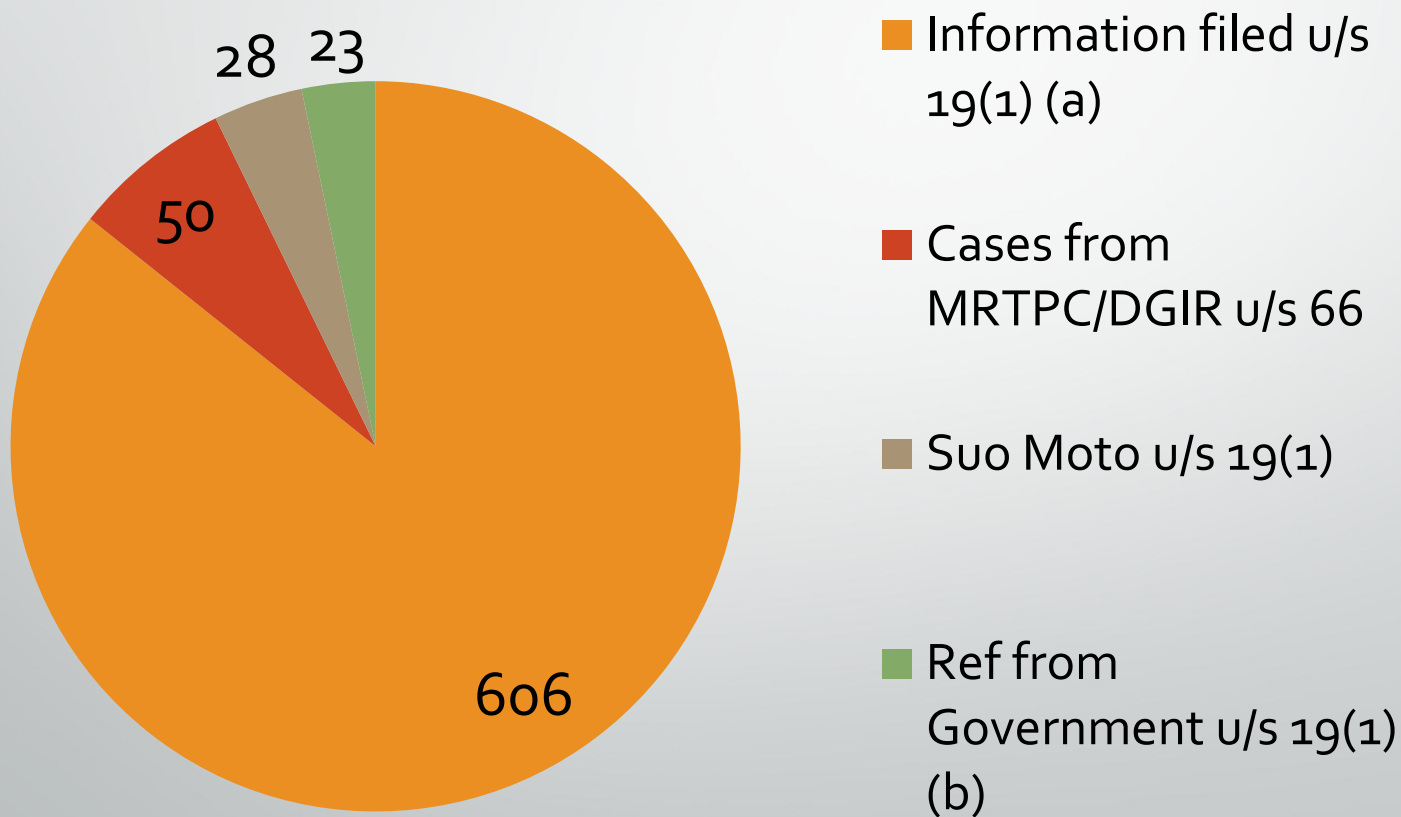
# ANTI-COMPETITIVE AGREEMENTS

- Agreements *Void-Per se*
- Horizontal Agreements
  - Determine Price
  - Limit / Control Production / Supply / Market
  - Share Market
  - Collusive Bidding
- Vertical Agreements: AAEC
  - Tie-in Arrangement
  - Exclusive Supply
  - Exclusive Distribution
  - Refusal to Deal
  - Resale Price Maintenance

## Prohibition of Abuse of Dominant Position

- Abuse is prohibited and not the dominance *per se*
- Abuse of dominant position [section 4(2)]:
  - Unfair or discriminatory pricing (including predatory pricing)
  - Limiting production or technical development
  - Denial of market access, in any manner
  - Tie-in agreements
  - Use of dominant position in one market to enter into or protect other **relevant market**

## Section 3 and 4: Antitrust (as on 31<sup>st</sup> March, 2016)





# Regulation of Combinations

- Combinations – *ex-ante*
- A notice is required to be filed within 30 days from the trigger date
- Act provides for **210 days** for the Commission to decide
  - Deeming provision - on expiry of the prescribed period if no order is passed, the combination is deemed to be approved

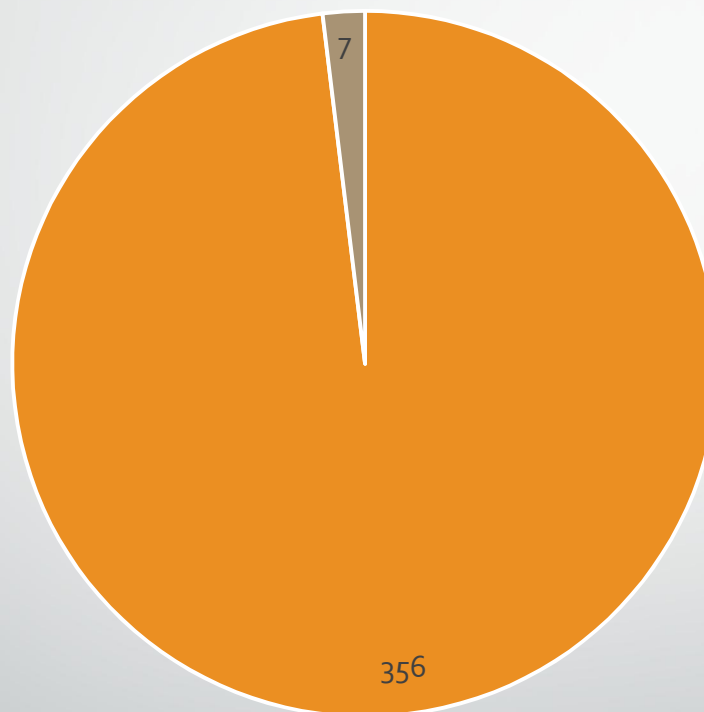
# Thresholds

(as Notified on 4 March 2016)

Criteria		Assets*	Turnover*
Only within India	Enterprise (s)	INR 2,000 crore (INR 20 billion rupees)	INR 6,000 crore (INR 60 billion)
	Group	INR 8,000 crore (INR 80 billion)	INR 24,000 crore (INR 240 billion)
Within and outside India	Enterprise (s)	US \$ 1000 m with at least INR 1000 crore (INR 10 Billion) in India	US \$ 3000 m with at least INR 3,000 crore (INR 30 Billion) in India
	Group	US \$ 4000 m with at least INR 1000 crore (INR 10 Billion) in India	US\$ 12000 m with at least INR 3,000 crore (INR 30 Billion in India)

\* Combined Asset/Turnover Value of both the entities is considered

## Section 5 and 6: Combination (as on 31<sup>st</sup> March, 2016)



Received Suo Moto

# Public Procurement

## What is Public Procurement?

- Purchase of goods and services by Government and its various entities/ departments. It is a key economic activity of government at Centre, State and local level.

## Objectives:

- i. Value for money – fair and transparent.
- ii. Promoting domestic capacity of suppliers
- iii. Equality of opportunity – level playing field
- iv. Widen supplier base
- v. Higher quality and technology

# International Experience – Pro-competitive Public Procurement

- OECD survey findings reflect saving to public treasury of 17 to 43% in developing countries
- European Commission – cost saving of Euro 5 billion to 25 billion between 1993 to 2003
- In Russia: Saving of \$7 billion to Govt. budget in 2008
- Pakistan: Saving of Rs.187 million for Karachi water and sewerage board
- Columbia: Saving of 47% in procurement of military goods
- Guatemala: Saving of 43% in purchase of medicines

# Indian Perspective

- **Size:** Public procurement in India: Constitute 15-20% of GDP
- **Legal and operational framework**
  - i. PPS operates through Article 53 of the Constitution and Govt. of India (Transaction of business) Rules
  - ii. Governed by General Financial Rules (GFR) and Delegation of Financial Powers Rules (DFPR)
  - iii. The GFR lays down procedure and rules of public procurement : a) details of quantity, quality, and type b) offers fair and transparent and legal procedures c) procuring authority should take a correct and logical decision
  - iv. The Contract Act, Sales of Goods Act, Arbitration Act and Limitation Act also provide broad framework for procurement

# Authorities : Regulators

- 3 –Cs :
  - Central Vigilance Commission (CVC)
  - Comptroller and Auditor General (CAG)
  - Competition Commission of India (CCI)

## Anti-Competitive Practice: BID RIGGING

**Bid rigging** : Highly pernicious form of collusive price fixing behavior where bids are obtained to earn and distribute higher profits

### **Kinds/forms of collusive bidding :**

- i) Collusive bidding
- ii) Bid rotation
- iii) Cover bidding
- iv) Bid suppression
- v) Market allocation



# Indicators of Bid Rigging

- Small number of companies
- Little or no entry
- Market conditions
- Industry associations
- Repetitive bidding
- Identical or simple products or services
- Few, if any, substitutes
- Little or no technological change



## BID RIGGING UNDER THE COMPETITION ACT, 2002

- Competition Act, 2002 specifically prohibits bid-rigging or collusive bidding (direct or indirect) under section 3(1) read with section 3 (3) (d) thereof. It is one of the four horizontal agreements that are considered *per-se* illegal
- In case an enterprise is a ‘company’, its directors/officials who are involved in decision making are also liable to be proceeded against.
- Provision for heavy penalty, up-to three years

# Case Study- 1

## In re: LPG cylinder manufacturers, Suo Moto Case No. 03 of 2011

- The Commission initiated *suo moto* proceedings against LPG cylinder manufactures who were found to be involved in bid rigging in supplying LPG cylinders to M/s Indian Oil Corporation Ltd. pursuant to a tender floated by it. It was noted by the Commission that the identical price quotations submitted by the opposite parties therein pursuant to the impugned tender were actuated by mutual understanding/ arrangements.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 7% of the average turnover of the company.

# Case Study- 2

## In re: Aluminium Phosphide Tablets Manufacturers, Suo Motu

### Case No. 02 of 2011

- Anti-competitive conduct in the tender for procurement of Aluminium Phosphide Tablets required for preservation of central pool food grains by Food Corporation of India.

**Principle-** Identical bid price is not possible unless there is some sort of prior understanding.

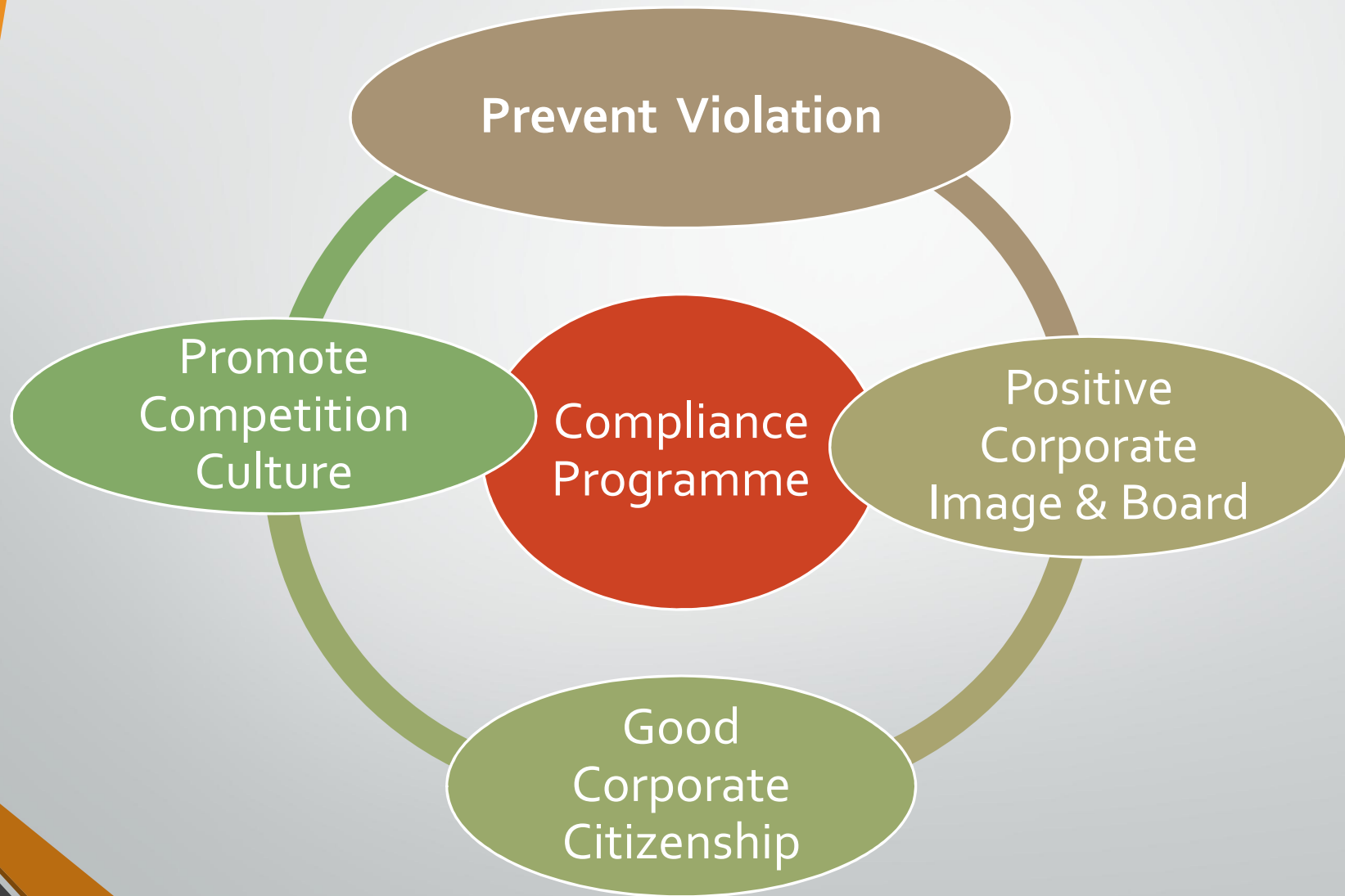
- Plus factors
- Cease and desist
- Penalty upon each party @ 9% of the average turnover of the company.

# Competition Compliance Programme

*"A formal internal framework to ensure businesses, i.e., the management and individual employees, comply with competition law" (CCS)*

- 'Prevention is better than cure' – the underlying Principle

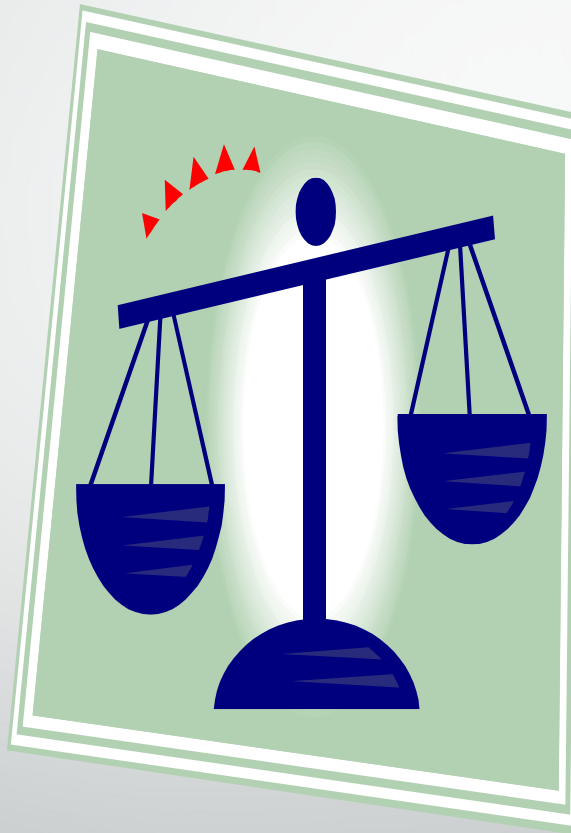
# Objectives of Compliance Programme



# Benefit vs Cost

## Benefit

- Compliance Culture
- Competitive Advantage
- Goodwill & Reputation
- Reduce penalties
- Reduced Negative effect of Litigation



## Cost

- Damage to reputation
- Heavy fines
- Drain of resources
- Loss of business opportunities
- Division of the dominant enterprise

# Essential features of CCP

- Explicit commitment of Senior Management
- Design a Compliance Manual
- Training of Employees
- Identify Employees and Divisions at Risk
- Confidentiality



Provisions of Competition Law



Zero Tolerance Policy



Do's and Don'ts list



Consequences of Breach



Compliance Officers Details



**COMPLIANCE MANUAL**

# Active Risk Management

Agreements

Dealing with Trade Associations

Evaluation and Review of CCPs

Role of Compliance Officer

Anti -Trust Audit

# Conclusion

- Beneficial to all enterprises
- Avoid insurmountable hardships of
  - Monetary fines,
  - Civil imprisonment,
  - Loss of hard-earned reputation

# Thank You

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