



2015

### Establishing Breach of Section 3 of the Competition Act, 2002 the Indian Bid Rigging Cases

John Handoll

Follow this and additional works at: <https://repository.nls.ac.in/nlsir>

---

#### Recommended Citation

Handoll, John (2015) "Establishing Breach of Section 3 of the Competition Act, 2002 the Indian Bid Rigging Cases," *National Law School of India Review*. Vol. 27: Iss. 2, Article 3.

Available at: <https://repository.nls.ac.in/nlsir/vol27/iss2/3>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in National Law School of India Review by an authorized editor of Scholarship Repository. For more information, please contact [library@nls.ac.in](mailto:library@nls.ac.in).



## ESTABLISHING BREACH OF SECTION 3 OF THE COMPETITION ACT, 2002 *THE INDIAN BID RIGGING CASES*

—John Handoll<sup>1</sup>

### I. INTRODUCTION

A significant percentage of Indian GDP is devoted to public spending on goods and services.<sup>2</sup> It is clearly important that public contracts should be contested for and won on the basis of competitive bidding, enabling the procuring body to get the lowest price/best value for money.

Bid rigging is as “*a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts.*”<sup>3</sup> This skews the tendering process and, by denying the procuring body the benefits of competition, can result in significant financial (and even social) harm. Bid rigging takes many forms, including identical pricing, cover bidding<sup>4</sup>, bid rotation, bid suppression, market allocation and collective boycotts.<sup>5</sup>

Effective competition law and enforcement are critical weapons in the public procurement armoury.<sup>6</sup> Competition law should set out the framework for establishing breach, taking into account the serious nature of bid rigging and the often secretive nature of such activity. The relevant competition authorities should enforce the law. In this regard, the rule of law should be followed: the

---

<sup>1</sup> Senior Adviser – European and Competition Law, Shardul Amarchand Mangaldas & Co.

<sup>2</sup> A recent report by UNODC suggests that public procurement spending accounts for between 20% and 30% of GDP, and that it accounts for more than 50% of the spending of several Government ministries. See UNODC, *India: Probity in Public Procurement*, 11 (2013), available at <http://www.unodc.org/documents/southasia/publications/research-studies/India-PPPs.pdf>.

<sup>3</sup> OECD, *Glossary of Statistical Terms*, available at <http://stats.oecd.org/glossary/detail.asp?ID=3334>.

<sup>4</sup> Also called “complementary”, “courtesy”, “token” or “symbolic” bidding.

<sup>5</sup> See OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009), available at <http://www.oecd.org/competition/cartels/42851044.pdf>.

<sup>6</sup> See OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (2012), available at <http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>.

starting point is, and has to be, that enterprises and individuals are innocent of any breach unless and until it is proved otherwise. The question, of course, is how it is to be 'proved otherwise' and, as will be seen below, the dice are to some extent loaded against those suspected of bid rigging.

This article considers how breach of Section 3 of the Competition Act, 2002 ("Act") has been established by the Competition Commission of India ("CCI") in the eleven bid rigging cases decided up to July 2015.<sup>7</sup>

## II. THE COMPETITION ACT, 2002

India's competition law rules are contained in the Act and Regulations made thereunder. The relevant provisions of the Act entered into force in May 2009. The CCI is responsible for enforcement: the Director General ("DG") assists the CCI in investigating prima facie cases of infringement, reporting on his/her findings to the CCI, which will then take the appropriate action. Appeals may be made against certain directions, decisions and orders of the CCI to the Competition Appellate Tribunal (the "COMPAT"). From there, an appeal may be made to the Supreme Court of India.

Section 3(1) of the Act prohibits individual enterprises or persons, and associations of enterprises, from entering into any agreement in relation to goods or services which causes or is likely to cause an appreciable adverse effect on competition ("AAEC") in India.

An AAEC is not defined in terms. However, Section 19(3) of the Act lists the six factors to which the CCI is to have due regard while determining whether an agreement has an AAEC: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; and (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Section 3(3) of the Act provides for a presumption of an AAEC in the case of four types of agreements, and other practices or decisions, including cartels, involving persons engaged in identical or similar trade of goods or provision of services. In terms, this provision, which places the burden to rebut the presumption on the parties concerned, covers agreements which

- (a) directly or indirectly determine purchase or sale prices;

---

<sup>7</sup> For a more comprehensive overview of the approaches of the CCI and the COMPAT, not including cases decided by the CCI in 2015, see J. Handoll, *India: Bid Rigging and Competition Law*, N°2 Concurrences Review, 218-224 (2015).

- (b) limit or control production, supply, markets, technical development, investment or the provision of services;
- (c) share the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any similar way; or
- (d) directly or indirectly results in bid rigging or collusive bidding

‘Bid rigging’ is defined in the Explanation to Section 3(3) of the Act as “*any agreement, between the enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.*”

It should be noted that a ‘bid rigging’ case may involve activities other than bid rigging as defined. Indeed, in many of the bid rigging cases discussed here, the CCI has established agreements covered by Section 3(3)(a), (b) and(c), as well as (d).

Where breach has been established by the CCI, Section 27 of the Act empowers it to take one or more steps. It may issue a ‘cease and desist’ order, impose financial penalties on the parties, direct that the agreements stand modified, direct the enterprises concerned to abide by such other orders as it may pass and comply with directions (including payment of costs) if any, or pass “*such other order or issue such directions as it may deem fit.*”

As regards financial penalties, Section 27(b) of the Act enables the CCI to impose a penalty of up to ten per cent of the average of the turnover for the last three preceding financial years. However, for an agreement entered into by a cartel, the CCI may impose on each person involved in the cartel, a penalty of up to three times of its profit, or ten per cent of its turnover for each year of continuance of the agreement, whichever figure is greater. It should be noted that in all the bid rigging cases decided to date where it decided to impose penalties, the CCI opted for the ‘standard’ penalties based on up to 10% of average turnover for the last three years, even though it clearly regarded bid rigging as cartelisation.

Once breach by a company has been established, individuals may themselves be liable under Section 48 of the Act. A person in charge of and responsible to the company for the conduct of its business shall, unless it can be proved he/she was unaware of the breach or had exercised all due diligence to prevent it, be deemed to be guilty and punished accordingly. Individual directors, managers, secretaries or other officers will also be deemed liable where breach has taken place with their consent or connivance, or is attributable to their neglect. Individual liability was not established in the earlier bid-rigging cases reviewed

here. However, in two recent cases<sup>8</sup>, the CCI stated that the liability of persons in charge of the relevant businesses at the time of contravention was the subject of separate proceedings which had yet to be completed, and this aspect is likely to feature in more such cases in the future.

### III. THE INDIAN BID RIGGING CASES

To date (August 2015), the CCI has established bid rigging in eleven cases,<sup>9</sup> covering identical/near-identical pricing<sup>10</sup>, cover bidding<sup>11</sup>, market allocation<sup>12</sup>, and collective boycotts<sup>13</sup>. Appeals have been decided by the Competition Appellate Tribunal (“COMPAT”) in five of these cases.<sup>14</sup> In one case, the COMPAT referred the question of penalties back to the CCI: the CCI made an order on this issue,

<sup>8</sup> *Bio-Med (P) Ltd., In re*, 2015 SCC OnLine CCI 91 : 2015 Comp LR 649 (CCI). See also *Sheth & Co. (Bomb Containers), In re*, 2015 SCC OnLine CCI 95 : 2015 Comp LR 715 (CCI).

<sup>9</sup> The CCI orders, in chronological order, are:

(1) *Suo motu case against LPG Cylinder Manufacturers, In re (LPG Cylinder Manufacturers)*, 2012 SCC OnLine CCI 12 : 2012 Comp LR 197 (CCI).

(2) *Coal India Ltd. v. Gulf Oil Corpn. Ltd. (Explosives)*, 2012 SCC OnLine CCI 21 : 2012 Comp LR 1 (CCI).

(3) *A Foundation for Common Cause & People Awareness v. PES Installations (P) Ltd. (Safdarjung Hospital)*, 2012 CCI 22 SCC OnLine: 2012 Comp LR 588 (CCI).

(4) *Aluminium Phosphide Tablets Manufacturers (Aluminium Phosphide), In re*, 2012 SCC OnLine CCI 25 : 2012 Comp LR 753 (CCI).

(5) *Gulshan Verma v. Union of India*, 2012 SCC OnLine CCI 30 : 2012 Comp LR 812 (CCI).

(6) *B.P. Khare v. Orissa Concrete & Allied Industries Ltd.*, 2013 SCC OnLine CCI 21 : (2013) 114 CLA 280 (CCI).

(7) *Director General (Supplies & Disposals) v. Puja Enterprises (Rubber Soles)*, 2013 SCC OnLine CCI 55 : (2013) 116 CLA 126 (CCI).

(8) *Diesel Loco Modernization Works, In re (Feed valves)*, 2014 SCC OnLine CCI 16 : 2014 Comp LR 170 (CCI).

(9) *Vaccines*

(10) *Bomb Containers*. ‘Institutional factors’ where “of these best practices as inappropriate. Institutions for reform, and it is wholly incorrect on the part”

(11) *Cartelisation by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna, In re (Public Sector Insurance Companies)*, 2015 SCC OnLine CCI 192.

<sup>10</sup> See *LPG Cylinder Manufacturers, Aluminium Phosphide, South Eastern Railways, Rubber Soles, Feed Valves and Bomb Containers*.

<sup>11</sup> See *Safdarjung Hospital, Jai Prakash Narain, Feed Valves and Vaccines*.

<sup>12</sup> See *LPG Cylinder Manufacturers, South Eastern Railway, Rubber Soles, Vaccines and Public Sector Insurance Companies*.

<sup>13</sup> See *Explosives and Aluminium Phosphide*.

<sup>14</sup> The COMPAT orders are, in chronological order:

(1) *MDD Medical Systems India (P) Ltd., In re (Safdarjung Hospital Appeal)*, 2013 SCC OnLine Comp AT 56 : 2013 Comp LR 327 (Comp AT).

(2) *MDD Medical Systems India (P) Ltd., In re (Jai Prakash Narain Appeal)*, 2013 SCC OnLine Comp AT 75.

(3) *Gulf Oil Corporation Ltd., In re (Explosives Appeal)*, 2013 SCC OnLine Comp AT 132 : (2013) 114 CLA 25 (CAT).

(4) *Excel Crop Care Ltd., In re (Aluminium Phosphide Appeal)*, 2013 SCC OnLine Comp AT 149 : 2013 Comp LR 799 (Comp AT). This is on further appeal to the Supreme Court.

which has now been appealed to the COMPAT.<sup>15</sup> Three cases have been appealed to the Supreme Court of India, with final judgement pending in all.<sup>16</sup> An appeal is also pending before the COMPAT in one other case.<sup>17</sup>

#### IV. FACILITATING ENFORCEMENT

A number of features of the Act have facilitated enforcement.

First, once bid rigging is established, an AAEC is presumed, with the burden of proving otherwise shifting to the parties concerned. In a number of cases, the CCI considered arguments seeking to rebut the presumption.<sup>18</sup> In some earlier cases, the CCI, perhaps showing an abundance of caution, conducted an AAEC analysis even though the opposite parties raised no arguments in this regard.<sup>19</sup> In the *Public Sector Insurance Companies* case, the CCI simply stated the presumption.<sup>20</sup> In the *Vaccines* case<sup>21</sup>, the issue was not addressed in such terms at all.

Second, as penalties are administrative rather than criminal, the CCI applies a lower standard of proof than that of ‘beyond reasonable doubt’ required in criminal cases. The description of this lower burden of proof has varied. The CCI at first stated that the standard was a “*balance of probability*” and “*liaison of intention*.”<sup>22</sup> It has later held that the test is a “*preponderance of probabilities*.”<sup>23</sup> The COMPAT has held that the test of a “*strong probability*” would suffice, but that its application would differ from case to case, with unlikely or particularly serious events requiring more convincing proof.<sup>24</sup>

Third, the term “agreement” is broadly defined in Section 2(b) of the Act to include “*any agreement or understanding or action in concert*,” whether or not it is formal, in writing or legally enforceable. The CCI has endorsed<sup>25</sup> the oft-repeated statement of Lord Denning that “*a nod or a wink will do*.”<sup>26</sup>

(5) *International Cylinder (P) Ltd., In re (LPG Cylinder Manufacturers Appeal)*, 2012 SCC OnLine Comp AT 195 : 2012 Comp LR 1116 (Comp AT).

<sup>15</sup> *Suo motu case against LPG Cylinder Manufacturers, In re*, 2012 SCC OnLine CCI 12 : *LPG Cylinder Manufacturers Appeal (No. 2)* (Appeals Nos. 64-67 and 71-72 of 2014, and 1-7, 17-19, 21-38 and 42-43 of 2015) (heard but not decided at the time of writing).

<sup>16</sup> *See Explosives Appeal, LPG Cylinder Manufacturers Appeal and Aluminium Phosphide Appeal*.

<sup>17</sup> *Stone India Ltd., In re (Feed Valves Appeal)*, Appeal No. 20 of 2014 (Comp AT).

<sup>18</sup> *See Rubber Soles at ¶44, Feed Valves at ¶52, and Bomb Containers at ¶40*.

<sup>19</sup> *LPG Cylinder Manufacturers ¶14.5, 14.66. See also LPG Cylinder Manufacturers Appeal at ¶44, 38; Aluminium Phosphide ¶7.32-7.43; and South Eastern Railway at ¶36-38*.

<sup>20</sup> *Public Sector Insurance Companies at ¶61*.

<sup>21</sup> *Vaccines*.

<sup>22</sup> *LPG Cylinder Manufacturers at ¶14.65*.

<sup>23</sup> *Aluminium Phosphide at ¶7.29, South Eastern Railway at ¶32, Rubber Soles at ¶25, Feed Valves at ¶32, Bomb Containers at ¶34*.

<sup>24</sup> *LPG Cylinder Manufacturers Appeal at ¶30, 31*.

<sup>25</sup> *LPG Cylinder Manufacturers at ¶14.9*

<sup>26</sup> *Registrar of Restrictive Trading Agreements v. W. H. Smith & Son Ltd.*, (1969) 1 WLR 1460 (CA).

Finally, given the often secretive nature of bid rigging and the difficulty of obtaining direct evidence of wrongdoing, the CCI can look for and rely on circumstantial evidence of bid rigging.<sup>27</sup> The CCI has made it clear that the existence of an anti-competitive practice or agreement can be inferred from the conduct of the colluding parties.<sup>28</sup> In a formulation employed in a number of the more recent cases, “*the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.*”<sup>29</sup>

## V. EVIDENCE OF BREACH

The evidence that may be used to arrive at a finding of breach will, of course, vary depending on the circumstances of each case and on the type of bid rigging. An attempt is made below to distinguish between different types of bid rigging and to look at the way the CCI (and the COMPAT) has sought to establish breach for each.

### A. Identical pricing

In relation to identical (or near-identical pricing), the CCI and the COMPAT have held that such pricing in itself cannot be conclusive evidence of collusion. However, collusion has been readily inferred where the different suppliers’ costs differ, and there are no plausible reasons for identical pricing.<sup>30</sup> A distinction has been drawn between cases of identical pricing with evidence of collusion and cases of conscious parallelism where ‘plus factors’ are required.<sup>31</sup> Evidence of repeated identical pricing may be sufficient for a finding of collusion<sup>32</sup>, though even here breach will be more readily inferred where there are supporting factors.<sup>33</sup>

<sup>27</sup> See *LPG Cylinder Manufacturers* at ¶14.12, *Safdarjung Hospital* at ¶6.2, *Safdarjung Hospital Appeal* at ¶18, *Aluminium Phosphide* at ¶7.29, *South Eastern Railways* at ¶33, *Rubber Soles* at ¶26, *Feed Valves* at ¶33, and *Bomb Containers* at ¶34.

<sup>28</sup> *Bomb Containers* at ¶34.

<sup>29</sup> *South Eastern Railway* at ¶33, *Rubber Soles* at ¶26, *Feed Valves* at ¶33, and *Bomb Containers* at ¶34.

<sup>30</sup> *LPG Cylinder Manufacturers* at ¶14.59.2-4, 14.60-14.63, *LPG Cylinder Manufacturers Appeal* at ¶36, *South Eastern Railway* at ¶12-13, 16.17, *Aluminium Phosphide* at ¶7.21-7.23, *Aluminium Phosphide Appeal* at ¶36, *Rubber Soles* at ¶27-32, *Feed Valves* at ¶31, 41-46, and *Bomb Containers* at ¶35.

<sup>31</sup> *LPG Cylinder Manufacturers* at ¶14.75, *LPG Cylinder Manufacturers Appeal* at ¶40, *Aluminium Phosphide* at ¶7.33, *South Eastern Railway* at ¶39, *Rubber Soles* at ¶46, and *Bomb Containers* at ¶38.

<sup>32</sup> *Aluminium Phosphide Appeal* at ¶36.

<sup>33</sup> *Feed Valves* at ¶47, 48.

Supporting factors have included: contemporaneous meetings between bidders<sup>34</sup>; the existence of a trade association giving competitors the opportunity to interact and discuss trade issues<sup>35</sup>; the appointment of common agents for depositing bids (and keeping a close watch on competitors)<sup>36</sup>; the filling of bids by the same person<sup>37</sup>; the same handwriting being used for different bids<sup>38</sup>; bidders using a similar format for covering letters<sup>39</sup>; bidders visiting the contracting agency together<sup>40</sup>; and the sharing of confidential documents.<sup>41</sup> The earning of “*huge margins*” by bidders, and the quoting of rates far in excess of costs, has led to an “*irresistible inference*” of collusion.<sup>42</sup> The CCI has also seen industry conditions and market features as supporting factors. In the recent *Bomb Containers* case<sup>43</sup>, it adverted to “*peculiar market conditions*”, such as few enterprises with the same owners, stringently standardized product and predictable demand.<sup>44</sup>

## B. Market Allocation

In relation to market allocation, the CCI has held that an intention to divide up supply was corroborated by the fact that the total quantity offered was very near to the quantity stated in the tender.<sup>45</sup> It has also held that, where the parties have restricted the quantity to be supplied, the fact that they have capacity well in excess of this could, absent any valid explanation, only be the result of collusive action for market allocation.<sup>46</sup> In *Vaccines*<sup>47</sup>, the CCI concluded that the ineligibility of a third competitor to bid resulted in the other two competitors agreeing to divide tendered quantities at substantially higher prices than previously: in reaching this conclusion, the CCI found that each was able to supply the full demand on its own, and that the price increases were neither in line with inflation nor justified by increased costs in production.<sup>48</sup>

---

<sup>34</sup> *LPG Cylinder Manufacturers* at ¶14.16-14.22.5, 14.23-14.25, 14.68-14.69, and *LPG Cylinder Manufacturers Appeal* at ¶20, 27.

<sup>35</sup> *LPG Cylinder Manufacturers Appeal* at ¶26, *Rubber Soles* at ¶33.

<sup>36</sup> *LPG Cylinder Manufacturers* at ¶14.26-14.27, 14.71 and *LPG Cylinder Manufacturers Appeal* at ¶22.

<sup>37</sup> *South Eastern Railway* at ¶15.

<sup>38</sup> *Id* at ¶17, 18.

<sup>39</sup> *Id* at ¶20, 21, 34.

<sup>40</sup> *Aluminium Phosphide* at ¶7.24-7.28.

<sup>41</sup> *Rubber Soles* at ¶34.

<sup>42</sup> *Aluminium Phosphide* at ¶7.44, 7.45.

<sup>43</sup> *Bomb Containers*.

<sup>44</sup> *Id* at ¶38.

<sup>45</sup> *South Eastern Railway* at ¶18, 40.

<sup>46</sup> *Rubber Soles* at ¶36, 41.

<sup>47</sup> *Vaccines*

<sup>48</sup> *Id* at ¶67.



### C. Cover Bidding

In establishing cover bidding, the CCI has referred to factors including: huge differences between bid rates<sup>49</sup>; bids containing common typographical and other errors<sup>50</sup>; bids containing identical technical deficiencies<sup>51</sup>; failure to submit the documents required or to accept required warranty clauses<sup>52</sup>; mismatching dates given in bid and supporting documents<sup>53</sup>; the making of simultaneous (or near-simultaneous) visits to the offices of the contracting authority<sup>54</sup>; and the preparation of separate price bids by the successful bidder with submission depending on the participation/non-participation of other bidders.<sup>55</sup>

The COMPAT has held that putting in technically deficient bids could not result in cover bidding where there were other qualified bidders.<sup>56</sup> It has also found as “*irrelevant and illogical*” a CCI finding that parties submitting bids at the same time showed some kind of understanding between them.<sup>57</sup>

In the very recent case involving *Public Sector Insurance Companies*<sup>58</sup>, the CCI considered a series of tenders involving public and private sector insurance companies for implementing health insurance schemes. This was a rare case of a ‘smoking gun’, since, in relation to a 2009 tender, the public sector companies admitted in that they had expressly agreed in a meeting of a coordination committee to share the business, with one of their number being the lead bidder. The CCI found that the 2009 agreement was implemented, since the companies had quoted on the basis of the decision taken in the meeting and they had admitted to entering into a business sharing arrangement after finalization of the tender. For tenders in later years, the CCI found that the successful bidder had forced termination of the contract by demanding an increase in premiums, with the public sector companies quoting significantly higher rates in subsequent tenders. The CCI found that the companies had again entered into business sharing arrangements, and stated that they had failed to provide any plausible justification for the significant rises in premium rates. Relying on internal documents from two of the companies showing the holding of meetings between the companies, the past practice in relation to the 2009 tender, and the bidding pattern over the two later tenders, the CCI concluded that the companies had agreed to manipulate the tendering process. Based on statements made by a successful private sector bidder,

<sup>49</sup> *Safdarjung Hospital* at ¶6.48 and *Safdarjung Hospital Appeal* at ¶12.

<sup>50</sup> *Safdarjung Hospital* at ¶6.28-6.47 and *Safdarjung Hospital Appeal* at ¶11.

<sup>51</sup> *Jai Prakash Narain* at ¶6.5.

<sup>52</sup> *Feed Valves* at ¶35-37.

<sup>53</sup> *Safdarjung Hospital* at ¶6.55-6.56. This was partly rejected by the COMPAT in *Safdarjung Hospital Appeal* at ¶14.

<sup>54</sup> *Vaccines* at ¶67.

<sup>55</sup> *Id.*

<sup>56</sup> *Jai Prakash Narain Appeal* at ¶19, referring to *Jai Prakash Narain* at ¶6.10.

<sup>57</sup> *Id.*

<sup>58</sup> *Public Sector Insurance Companies* at ¶27-60.

who had succeeded in a subsequent tender, the CCI rejected arguments that the public sector companies were incurring losses: instead, the CCI saw the forcing of retendering and higher quotations in collusion as a “*virtual fraud*” forced on the contracting authority.

#### D. Collective Boycotts

In relation to collective boycotts, the CCI found in *Explosives*<sup>59</sup> that bidders had acted collectively, rather than independently, in boycotting an auction where two suppliers had written identical letters explaining their non-participation, and bidders later participated in a similar auction.<sup>60</sup> The COMPAT held that such parallel behaviour could not be coincidental given widespread opposition to the premature termination of existing contracts and to the holding of the auction in question, the manner in which the suppliers acted in relation to the auction, the letters from the suppliers, and actions taken by the suppliers’ representative body.<sup>61</sup> In *Aluminium Phosphide*<sup>62</sup>, the CCI held that the very fact of non-participation in a procurement procedure suggested a meeting of minds.<sup>63</sup> The COMPAT, linking this boycott to identical pricing, held that such pricing and such boycott “*viewed on the backdrop of consistent practice of offering only identical bids*” confirmed that it was made with a common design.<sup>64</sup>

### VI. INDUSTRY FEATURES TENDING TO COLLUSION

The CCI in *LPG Cylinder Manufacturers* held that bid rigging was more likely to occur where particular features of the industry or of the product tended to collusion.<sup>65</sup> Such features were market conditions, the small number of suppliers, few new entrants, active trade associations, repetitive bidding, identical/similar products, few or no substitutes, and no significant technological changes. The COMPAT supported some of these findings on appeal.<sup>66</sup>

The CCI has again referred to general industry features in a couple of recent cases. In *Vaccines*<sup>67</sup>, “*peculiar market conditions*” making the market conducive to collusion were the presence of only three suppliers, the homogeneous nature of the product, fixed demand in the market, and the fact that the suppliers were

---

<sup>59</sup> *Explosives*.

<sup>60</sup> *Id* at ¶8.27-8.32.

<sup>61</sup> *Explosives Appeal* at ¶43-48.

<sup>62</sup> *Aluminium Phosphide*.

<sup>63</sup> *Id* at ¶7.36-7.39.

<sup>64</sup> *Aluminium Phosphide Appeal* at ¶36.

<sup>65</sup> *LPG Cylinder Manufacturers* at ¶14.14, 14.15, where the CCI endorsed the approach taken by its DG.

<sup>66</sup> *LPG Cylinder Manufacturers Appeal* at ¶21, 26, 31.

<sup>67</sup> *Vaccines*.

repetitive bidders.<sup>68</sup> In *Bomb Containers*,<sup>69</sup> it held that a number of typical market conditions strongly indicated that the market was very conducive to competition: the small number of manufacturers, their geographical proximity, the absence of new entrants, predictable and stable demand, stringently standardized product, and the non-availability of substitutes.<sup>70</sup> It also considered that the cross-ownership of few market players unequivocally pointed towards concerted action in the bidding process, with the “*modus operandi*” of at least ten out of thirteen firms concerned “*governed by the principles of mutual understanding and benefit*”.<sup>71</sup>

## VII. CONCLUSION

In the space of under four years, the CCI has made orders establishing bid rigging in eleven cases. On appeal, the COMPAT in all but one case<sup>72</sup> largely upheld the CCI’s substantive findings. One of these cases is currently before the COMPAT for the first time<sup>73</sup> and another for the second time (on the issue of penalties).<sup>74</sup> The COMPAT’s verdict remain to be seen. Although the verdict of the Supreme Court is awaited in three of these cases, the number of cases addressed by the CCI and COMPAT in this field is impressive. Their ability to establish bid rigging has clearly been helped by the broad definition given to prohibited conduct, by the presumption of an appreciable adverse effect on competition, and (last but not least) the ability to rely on indirect or circumstantial evidence to establish breach. These tools have been used to good advantage. The proof of the pudding is in the eating and, when all is said and done, there is an impressive body of practice in India.

However, one should be wary of circumstantial evidence. By its nature, it is ‘circumstantial’ and less reliable than indirect evidence. This is even more the case where a civil standard of proof is being applied. It is important that the CCI and, later on, the COMPAT are meticulous in the gathering and assessment of all types of evidence, and do not jump to hasty conclusions.

---

<sup>68</sup> *Id* at ¶67.

<sup>69</sup> *Bomb Containers*.

<sup>70</sup> *Id* at ¶36).

<sup>71</sup> *Id* at ¶37).

<sup>72</sup> *Jai Prakash Narain Appeal*.

<sup>73</sup> *Feed Valves Appeal*.

<sup>74</sup> *LPG Cylinder Manufacturers Appeal (No. 2)*.