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COLLABORATIVE PUBLIC PROCUREMENT:

A Quick Review of International Best Practices and the Indian Position on Pooled Procurement from Competition Law Perspectives

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ABSTRACT

Under certain circumstances, collaborative public procurement can result in overall economic efficiencies and lower procurement costs. However, such collaboration amongst dominant market players can sometimes also raise significant anti-trust and other competition concerns. This short working paper contains a preliminary exploration of important issues of intersection between public procurement rules on collaborative procurement on the one hand with competition law issues on the other. The two important frameworks studied herein are the US and the EU frameworks on collaboration, together with a comparative review of the Indian position.

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Collaborative public procurement in its various forms, including pooling of procurement volumes by distinct procuring entities and by way of common framework agreements, is not only expressly permitted under procurement regulations in India[2], but has indeed been encouraged by the Government in a variety of cases for reasons of public interest[3]. Under certain situations, collaborative public procurement may perhaps be the only significant strategic tool available to developing countries, as producers from industrialised countries are known to operate as international cartels in markets of interest, with potential for considerable harm to consumers and producers in developing countries[4].

However, all possible forms of collaborative procurement may not be necessarily compliant with Indian competition laws[5]; and it is in this context that a quick study of international best practices and a comparative review of the Indian situation may be of value to various stakeholders such as public policy-makers, procurement entities, anti-trust regulators, end-consumers of public services, and of course, the affected suppliers as well. The analysis of the Indian situation in this paper has been undertaken from a competition law and case law perspective, and specifically excludes analysis from a competition policy perspective, as the National Competition Policy, 2011 is still in a draft form[6] and is yet to formally adopted by the Government.

1. INTRODUCTION

Collaboration in public procurement implies the coming together of various purchasing entities, which may or may not be competitors in their respective markets of interest. For instance, government hospitals could combine their procurement volumes in order to obtain best price discounts for drugs or medical equipment[7], and electricity utilities could combine their strengths to drive hard

[2] For instance, Indian procurement rules envisage the creation of a *Central Purchasing Organisation* to bring in rate contracts for common user items frequently needed in bulk by various Ministries/ Departments; ¶1.1.3(iii), *Manual of Policies and Procedures for Purchase of Goods*, p.4, http://finmin.nic.in/the_ministry/dept_expenditure/acts_codes/MPProc4ProGod.pdf).

[3] Recent instances in India include an attempt by public sector banks to jointly procure ATM services (*State Bank of India led state-run bank's consortium to install 40,000 ATMs by March 14*, http://in.finance.yahoo.com/news/state-bank-india-led-state-120603813.html) and the ongoing joint industry tenders for ethanol procurement by Oil Marketing Companies (OMCs) for blending with retail petrol marketed by them; *PIB Press Release*, November 22 2012, http://www.pib.nic.in/newsite/erelease.aspx?relid=89270. Current proposals also include creation of a *Special Purpose Vehicle* for direct aviation fuel imports where the *Airports Authority of India*, OMCs and airlines will have equity participation (*AAI to create common infra for direct aviation fuel imports*, Business Standard, June 07 2013, http://www.business-standard.com/article/companies/aai-to-create-common-infra-for-direct-aviation-fuel-imports-113060600692_1.html), as well as a proposed joint venture company promoted by public sector oil companies for streamlining crude oil imports into India (*Panel moots joint venture of PSUs for smooth crude oil imports*, The Hindu Business Line, May 08 2013, http://www.thehindubusinessline.com/companies/panel-moots-joint-venture-of-psus-for-smooth-crude-oil-imports/article4696154.ece).

[4] Levenstein, M., and Suslaw, V.Y. (2004), *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 Antitrust Law Journal No. 3, http://www-personal.umich.edu/~maggiel/ALJ.pdf.

[5] *Ethanol Bid Process under CCI Scanner*, The Financial Express, June 03 2013, http://www.financialexpress.com/news/ethanol-bid-process-under-cci-scanner/1124070.

[6] Ministry of Corporate Affairs (2011), *Draft National Competition Policy 2011*, http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf.

[7] Barbosa, K. and Fiuza, E. (2011), *Demand Aggregation and Credit Risk Effects in Pooled Procurement: Evidence from the Brazilian Public Purchases of Pharmaceuticals and Medical Supplies*, pp.8-9, http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/10009/TD%20299%20-%20C-Micro%2014%20-%20Klenio%20Barbosa%20e%20EduardoFiuza.pdf?sequence=1.

bargains with other wholesale players in electricity markets[8]. In a different context, as in India, Oil Marketing Companies (OMCs) competing with each other in the retail petroleum market could pursue joint buying of transportation services in order to encourage overall allocative efficiencies in transportation assets management[9].

Such contract collaboration can take both "hard" well as "soft" forms: the former *hard* category being cases where procurement qualities are clubbed together ("demand aggregation") usually for the purposes of obtaining efficiency and better value for money, although requisite economies may not necessarily arise particularly in cases where inefficient purchasers (high credit risk purchasers) club their procurement with relatively inefficient purchasers[10]. Another variant of the former *hard* approach is framework agreements (rate contracts as they are known in India) for use by various procuring entities, where both technical specifications and prices could be negotiated and/ or finalised by a contract-setting authority, but individual sub-contracts or supply orders may be placed separately by each procuring entity[11].

On the other hand, the latter *soft* category includes cases such as mandatory common technical specifications or interoperability standards for equipment/ supplies[12], although standardisation *per se* can have a *de facto* adverse effect in terms of limiting suppliers or innovation under certain circumstances[13]. For reasons of focus and brevity, only the former category of *hard* collaborations is examined in this short working paper.

2. INSTITUTIONAL ARRANGEMENTS FOR COLLABORATIVE PROCUREMENT

In terms of the possible institutional arrangements for joint purchasing, the available literature classifies them into two broad categories[14]: (i) *Permanent* Collaborative/ Joint Procurement Organisations[15] where a central purchase organisation (CPO) is established by various procuring entities to provide a centralised procurement function, whose services could be financed through a small commission charged on all procurement actions; and (ii) *Collaborative agreements* between contracting

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[8] *Florida Municipal Power Agency-Fact Sheet*, FMPA, http://www.fmpa.com/index.php/about-us/fact-sheet.
[9] *Chapter II-Marketing Organisation Structure*, Report of the Standing Committee on Petroleum & Chemicals, ¶4.5, http://164.100.24.208/ls/committeeR/Petro&Chem/23/2-4.html.
[10] *See*, *generally*, Barbosa & Fiuza, *supra* n.7.
[11] A commonly used US equivalent of framework agreements is an *Indefinite Delivery Indefinite Quantity* (IDIQ) contract. For an exact definition of IDIQ contracts, *see* ¶16.504, FAR.
[12] The *Ministry of Home Affairs* in India, for instance, routinely issues standard technical specifications/ qualitative requirements for technical equipment procured by central armed forces under its jurisdiction; *e.g.*, *see*, *Police Modernisation Division-Qualitative Requirements*, http://mha.nic.in/uniquepage.asp?Id_Pk=240.
[13] *See*, *generally*, Pappalardo, K. and Suzor, N. (2011), *Standardisation and Patent Ambush: Potential Liability under Australian Competition Law*, Competition and Consumer Law Journal, http://nic.suzor.net/wp-content/uploads/2009/11/Pappalardo-Suzor-2011-Standardisation-and-patent-ambush-Potential-liability-under-Australian-competition-law-CCLJ.pdf.
[14] *See*, *e.g.*, European Commission (2008), *Joint Procurement -Fact Sheet*, pp.4-5, http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_joint_procurement.pdf.
[15] Examples of such permanent organisations are the *Eastern Shires Purchasing Organisation* in the UK, owned by member local authorities, and the *Eco-Procurement Service of Vorarlberg* in Austria providing a centralised procurement service for 80 local authorities in the Region of Vorarlberg; EC, *supra* n.2, p.14. Examples in the USA include the *STARS Alliance LLC*—an association of seven nuclear utility operators that procures certain supplies/ services jointly on behalf of association members; *STARS Alliance LLC*, http://www.starsalliance.com/about_us.asp. In Tanzania, the *Petroleum Importation Coordinator* (PIC) collects procurement requirements from *Oil Marketing Companies* (OMCs) and concludes and administers contracts with suppliers and between the PIC and OMCs; *Functions of PICL*, www.picltz.com.

authorities[16], without separate legal status, that come together on a one-time basis or permanently through an agreed model of participation, with a lead entity normally taking responsibility for contract-setting on behalf of all members.

3. EFFECTS OF COLLABORATIVE PURCHASING

Under certain circumstances, collaborative public procurement can have beneficial impacts in terms of lower prices[17], administrative cost savings and pooling of skills and expertise amongst various procuring entities[18], although as stated earlier, clubbing high credit risk purchasers with relatively inefficient purchasers may lead to higher procurement costs for those purchasers who were already more efficient than the rest of the group[19]. In addition, particularly in the European Union, collaborative public procurement is also being increasingly used as a convenient entry door for introducing sustainable procurement and standardising environmental demands[20], although frequent use may also result in creation of artificial entry barriers for non-domestic suppliers of competing products[21].

Perhaps a matter of greater concern with joint purchasing agreements is their potential to result in *buyers' cartels*, especially when large competitors come together with an illegitimate aim of using their high degree of buyer power to cause competitive harm to suppliers or for retaining excess profits without any pass-through to their end-consumers[22]. In addition, large buyers may also collaborate to abuse their monopsony (or *near*-monopsony) power to depress the purchase of a product below competitive levels, or, at another end, buying group formation can become a convenient instrument/ front to facilitate collusion through downstream coordination amongst suppliers[23].

4. INTERNATIONAL PERSPECTIVES ON COLLABORATIVE PUBLIC PROCUREMENT

Collaborative public procurement, either through joint buying by distinct procuring entities, or through *piggybacking* mechanisms such as framework agreements, falls within an interesting intersection of public procurement law and competition law. However, to the extent that public procurement marketplaces in advanced

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[16] Permanent collaborative arrangements in the UK include the *London Contracts and Supplies Group* providing for coordinated procurement actions on behalf of the *Greater London Council*, the *Inner London Education Authority* and *London Boroughs*; *About LCSG*, http://www.lcsg.org/site/about.htm. Collaborative arrangements can also be *one-off*, such as the joint procurement of ATM services recently attempted by public sector banks in India, or the ongoing cases of joint industry tenders for ethanol procurement by Oil Marketing Companies in India, for blending with retail petrol marketed by them; Yahoo, *supra* n.3.
[17] Burnett, F. (2003), *Reducing Costs Through Regional Pooled Procurement*, Essential Drugs Monitor No. 32/2003; http://apps.who.int/medicinedocs/en/d/Js4940e/4.html.
[18] EC, p.2, *supra* n.14.
[19] Barbose & Fiuza, *supra* n.7.
[20] EC, p.3, *supra* n.14.
[21] Brenton, P., Sheehy, J., and Vanvcauteren, M. (2000), *Technical Barriers to Trade in the European Union: Importance for Accession Countries*, CEPS Working Document No. 144, http://www.ceps.eu/files/book/54.pdf.
[22] Koponen, J. (2011), *Joint Purchasing Agreements-The EC's 2011 Horizontal Co-operation Guidelines*, https://www.coleurope.eu/content/gclc/documents/J.%20Koponen%20-%20Joint%20purchasing%20agreements%20(2).pdf.
[23] For a detailed analysis of theories of harm relating to joint buying, including monopsonies and bilateral monopolies, *see* Fiandeiro, F., Choudhary, K. and Anderson, P. (2011), *The Assessment of Joint Purchasing: Can Too Much "Buying Power" Ever Be A Problem*, Journal of Economic and Financial Studies, pp.113-132, http://reference.sabinet.co.za/webx/access/electronic_journals/jefs/jefs_v4_si1_a2.pdf.

jurisdictions such as the United States have comparatively fewer public procurement entities that are expected to compete in commercial marketplaces, a cursory review of available literature seems to suggest that anti-competitive effects of collaborative public procurement have not received due attention in academic or regulatory documentation on the subject[24].

The United States' acquisition guidance for federal contracts, to the best of this author's understanding, does not specifically require a competition/ anti-trust law analysis, and even the European Commission's toolkits on joint public procurement do not contain any specific references to the otherwise rather extensive EC guidelines on horizontal co-operation agreements. Public procurement laws in these jurisdictions allow for collaborative procurement amongst procuring entities; and separately, specific government/ regulatory guidance is available that addresses joint purchasing agreements in general *amongst competitors*, without focusing on joint purchasing agreements *amongst government entities* as such. The following section discusses certain best practices in both procurement law and competition law guidance on collaborative procurement in some of these national jurisdictions.

4.1 Collaborative Public Procurement in the United States

The US Federal Acquisition Regulation (FAR) contains extensive guidance on a number of ways in which federal public procurement authorities may collaborate in respect of their procurement actions. As an important example, the FAR permits "inter-agency acquisition" as a permissible procedure by which an agency needing supplies or services (*requesting* agency) can obtain them through another federal government agency (*servicing* agency), either through: (i) *direct acquisitions*, where the requesting agency places an order *directly* against a servicing agency's contract; or (ii) *assisted acquisitions*, where a servicing agency and a requesting agency enter into an inter-agency agreement *pursuant to which* the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order[25].

Contractual arrangements that are most frequently used for inter-agency acquisitions are *IDIQ contracts*, using vehicles such as *GSA Schedules* (*Multiple Award Schedules/ Federal Supply Schedules*), *GWACS* (Government-Wide Acquisition Contracts) and *Multi-Agency Contracts*[26].

As mentioned earlier, the FAR does not appear to contain any specific requirements for addressing potential anti-trust implications of such contracting arrangements; although as a separate, unrelated matter, the FAR requires contract *unbundling* to be

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[24] A recent OECD/EU publication, however, recognises *market concentration*, *uniformity & standardisation*, and *reduction in SME opportunities* as potential adverse effects of collaborative (centralised) procurement; SIGMA (2011), *Central Purchasing Bodies*, p.6, Brief 20 Public Procurement, http://www.oecd.org/site/sigma/publicationsdocuments/48630136.pdf.

[25] For an excellent discussion of inter-agency contracting under FAR, *see* Chapter 11 of *165th Contract Attorneys Handbook* (July 2012).

[26] *Ibid*.

examined at the acquisition planning stage from a small business set-aside perspective[27].

Insofar as anti-trust issues are concerned, the Federal Trade Commission (FTC) and the Department of Justice (DoJ) issued extensive guidelines[28] in 2000 for collaboration amongst competitors. Under these guidelines, joint purchasing agreements, to the extent that they do not/ tend not to raise prices or reduce output are required to be addressed under the "Rule of Reason" and may not be *per se* illegal[29]. The analytical framework for horizontal co-operation requires a close assessment of: (i) the nature of the relevant agreement, especially if it facilitates collusion; (ii) relevant markets affected by the collaboration, including goods markets, technology markets and innovation markets; (iii) market shares and market concentration; (iv) factors relevant to the ability and incentive of the participants and the collaboration to compete, for instance, exclusivity, control over assets, financial interests, control of the collaboration's competitively significant decision-making, likelihood of anti-competitive information-sharing, and duration of the collaboration; (v) entry requirements; (vi) identification of any pro-competitive benefits; and (vi) overall competitive effect[30]. These Guidelines also establish safety zones for competitor collaborations in general at no more than twenty percent in relevant output market and thirty-five percent in the relevant input market in which competition may be affected[31].

In terms of executive/ regulatory guidance, the DoJ in a joint purchasing alliance case recently issued a business review letter[32], indicating that, *inter alia*, the following aspects could be important in a determination whether such horizontal cooperation agreements would be in violation of anti-trust law: (i) monitoring the buying group's market shares in the input and output markets for compliance within permissible safety zones; (ii) whether the purchasing program imposes minimum purchasing requirements on association members; (iii) whether participation of members is equally available to all and is not limited by size, type or location of member; (iv) whether joint purchasing results in control/ stabilisation of prices, or is used to boycott suppliers; (v) whether competitively important information is shared between association members; and (vi) whether joint buying activity is independently handled and negotiated with suppliers[33].

4.2 Collaborative Public Procurement in the European Union

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[27] FAR 2.101, *read with* FAR 7.107. *See*, *also*, §413, Pub. Law No. 105-135 *and* FAR 7.104(d) *read with* 15 USC §644(a) & (e).
[28] FTC & DoJ (2000), *Antitrust Guidelines for Collaborations Amongst Competitors*, http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.
[29] ¶3.2, p.8, *ibid*.
[30] ¶¶3.31-3.37, pp.12-25, *ibid*.
[31] ¶4.2, p.26, *ibid*; *read with* Bigart, A., Fales, L.J., and Tenenbaum, J.S. (2013), *Managing Association Joint Purchasing Programs without Violating the Anti-Trust Laws: Lessons from a DOJ Business Review Letter*, http://www.venable.com/managing-association-joint-purchasing-programs-without-violating-the-antitrust-laws-lessons-from-a-doj-business-review-letter-02-08-2013/.
[32] DoJ(2013), *STARS Alliance LLC Second Business Review Request*, http://www.justice.gov/atr/public/busreview/290492.htm.
[33] Fales, L.J., and Bigart, A.E.(2013), *United States: Ten Practical Tips for Joint Purchasing without Violating the Antitrust Laws*, http://www.venable.com/ten-practical-counseling-tips-for-joint-purchasing-without-violating-the-antitrust-laws-01-09-2013/. *See*, *also*, Bigart *et al*, *supra* n.31.

As in the United States, framework agreements are a favoured contractual vehicle for collaborative procurement in the EU. More specifically, EU directives on public procurement allow the use of one agency's framework agreements by another[34] (including collaborative procurement by utilities[35]). In addition, procurement agencies are also allowed pooling through the process of national governments designating one or more *central procurement body(ies)* (CPBs)[36] that could be exclusively mandated to procure certain goods and services for user departments[37,38].

However, as stated earlier, the EU does not appear to have specific procurement guidance addressing collaborative public purchasing from a competition law/ anti-trust law perspective. Collaborative public procurement in the EU may therefore need to satisfy the *normal* competition requirements placed by EC laws and guidance on co-operation agreements. In particular, joint purchasing agreements, if carried out as a full-function joint venture, need to comply with the *EU Merger Regulation* (EUMR)[39]; and other forms of horizontal cooperation need to comply with Article 101 of the *Treaty on the Functioning of the European Union* (TFEU)[40].

Inter alia, Article 101 of TFEU declares as prohibited any agreements that directly or indirectly fix purchase prices between covered undertakings, but allows qualified derogation in respect of any agreement or category(ies) of agreements. In pursuance of this authority, the EC has issued *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* (EUHC Guidelines)[41]; and part 5 of these guidelines deals specifically with co-operative purchasing agreements.

The EUHC Guidelines recognise that joint purchasing could be pro-competitive in cases where they allow smaller rivals to achieve similar purchasing economies to larger competitors in the form of lower prices, but also caution about the complexities involved when dominant market operators enter into joint purchasing

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[34] See Article 1(5) of EC Directive 2004/18/EC (the "Classical" Directive) for a definition of framework agreements under EU Law.
[35] See Article 1(4) of EC Directive 2004/17/CE (the "Utilities" Directive) for a definition of framework agreements in the context of covered utilities.
[36] One such CPB in the UK is the *Government Procurement Service* (GPS) in the UK setup as a *trading fund* under its Government Trading Funds Act of 1973, and works on a *supplier commission* model. The GPS provides essentially three models of procurement services' delivery: (i) self service by buying organisations through frameworks and other contracting arrangements; (ii) assisted delivery such as spot buying and eAuctions; and (iii) end-to-end managed procurement services; http://gps.cabinetoffice.gov.uk. For more details on CPBs under EU Law, *see* SIGMA, p.2, *supra* n.21.
[37] There may be one possible exception to this exclusive authority: when a CPB acts as a "wholesaler", i.e., when it acquires supplies or services intended for other contracting authorities, it cannot award public works contracts; *The Answers of EC and EU Member States Representatives concerning Centralised Public Procurement*, http://www.publicprocurementnetwork.org/docs/mutual/PPN_%20Members_answers_concerning_centralized_public_procurement-compilation_document.pdf.
[38] Within the EU, there seems to be considerable divergence on whether purchasing certain goods and services through designated CPBs is *mandatory* or *optional*. In Austria, Ireland, Denmark, Italy, Finland, France, Hungary and Germany, for instance, it is mandatory to buy certain goods and services from designated CPBs, whereas Sweden, UK, Slovakia, Estonia encourage collaboration without making CPBs as a mandatory channel for procurement; *ibid*, and SIGMA, p.8, *supra* n.24.
[39] Koponen, *supra* n.22.
[40] Consolidated version of TFEU is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF.
[41] EC (2011), *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

agreements[42]. These guidelines therefore require joint purchasing agreements to be analysed in terms of both horizontal and vertical elements: the horizontal arrangements between competitors purchasing jointly, and the vertical arrangements between the suppliers and the joint purchasing group, including, in some cases, the downstream arrangements between the purchasing group and its members. In addition, the EUHC Guidelines also require an examination of the purchasing markets (input markets) and the selling markets (output markets) in terms of geographical distribution and the collaborating parties' market positions[43].

In general, the guidelines indicate that competition harm would be less likely if the collaborating parties have a combined market share of not more than fifteen percent on both the purchasing market(s) and the selling market(s). If these "safe" harbours are breached, the guidelines then require a detailed examination of a number of issues under a "Rule of Reason" approach as follows: (i) whether the cooperating purchasers are active in different selling markets; (ii) whether commercial sensitive data is being collated by a joint purchasing agency which does not pass on information to its members[44].

4.3 Lessons from International Best Practices

A number of useful pointers can be safely drawn from a review of US and EU guidance on collaborative public procurement. Firstly, insofar as joint purchasing arrangements between competitors is concerned, the general inclination seems to be to adopt a "Rule of Reason" approach rather than a "per se" approach for analysing the competition effects, although certain countries such as South Africa, for instance, appear to treat joint purchasing as per se illegal[45]. The primary intention in these two major anti-trust jurisdictions to allow the survival of collaborative procurement seems to be to permit joint purchasing amongst *smaller* economic operators to enjoin the benefits of joint purchasing in terms of lower prices, and both US and EU therefore draw tolerance limits through *safe harbours* in input (buying) markets and output (selling) markets beyond which an analysis of competition effects is necessarily warranted.

An important and common area of concern in these two jurisdictions is the potential for sharing of commercially sensitive information between collaborating entities, where anti-trust guidance seems to suggest that maintaining an arms-length between collaborators may be necessary by routing collaborative purchases through a *separate/ independent* purchasing agency. Other important lessons, arising out of the US experience, relate essentially to: (i) whether participation in the joint purchasing arrangements by association members is voluntary—the anti-

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[42] Ashurst (2011), *Quickguides: Co-operation Agreements between Competitors*, ¶5, pp.4-5, http://www.ashurst.com/doc.aspx?id_Resource=4712.
[43] *Ibid*.
[44] p.5, *Ibid*. Separately, the UK Office of Fair Trading adopted a more benign approach to joint purchasing in a short-form opinion in 2010 on joint purchasing agreements, indicating that competitive harm would be unlikely where the collaborating parties have no downstream market power; OFT(2010), *P&H/MAKRO Joint Purchasing Agreement*, http://www.oft.gov.uk/shared_oft/SFOs/SFO_on_Joint_Purchasing.pdf.
[45] Fiandeiro *et al*, *supra* n.23.

competitive effects being presumed to be much less is participation is voluntary rather than mandatory; and (ii) whether joint purchasing arrangements are used by collaborators for price stabilisation and/ or price control, without passing on economic benefits to their consumers—the anti-competitive effects being higher if the economic advantages of joint buying are retained by collaborators rather than being passed-through to end-consumers.

In regard to joint purchasing by public procurement entities that are not competing amongst themselves in commercial marketplaces, a common tendency under public procurement laws both in the US and the EU, is to permit or encourage such collaboration, although as stated earlier, the procurement guidance seems to avoid a specific discussion on potential competitive harm issues, rather than addressing them upfront from an anti-trust perspective. To that extent, while highlighting competition concerns with agglomerated buying, the procurement guidance in the two jurisdictions does not really attempt to distinguish collaborations between *hard-core government* purchases vis-à-vis collaborations between *public entities operating as dominant economic operators in commercial marketplaces*.

5. COLLABORATIVE PURCHASING IN INDIA

The Government of India have allowed joint tenders by *Central Public Sector Enterprises* (CPSEs)[46] in a few cases in the recent past, although cases of different government departments bundling their requirements appear to be absent. This appears to have been done sometimes through *plain administrative orders* by the concerned administrative Department (as in the case of joint tendering for ATMs by public sector banks), and sometimes through *policy decisions* of the Government (as in the case of ethanol procurement by OMCs), without citing any specific provision of *General Financial Rules 2005* (GFR-2005) or any other relevant/ applicable procurement rules of concerned entities or statutory authority of the Government. In order to appreciate the legal position better, it may therefore be worthwhile to examine the procurement rule position, as well as the competition law position, relating to joint purchasing agreements in India.

5.1 The Procurement Rule Position

While both *GFR-2005* as well as the *Manual for Policies and Procedures for Purchase of Goods* ("Manual") issued thereunder are silent on collaborative purchases through one single contract issued by one procuring entity on behalf of a group, the *Manual* does contain an enabling provision for rate contracts (framework agreements), whereby a designated *Central Purchase Organisation* (CPO)[47] can bring in rate contracts for common user items frequently needed in bulk by various Ministries/ Departments[48]. Two important features of the provision are: (i) placement of supply orders by a user organisation against a rate contract established by a CPO is at the

[46] The traditional international terminology for such enterprises is *State-owned Enterprises* (SOEs).
[47] The *Directorate General of Supplies and Disposal* (DGS&D) under the Ministry of Commerce is one such CPO; *see* www.dgsnd.gov.in.
[48] *Manual*, ¶1.1.3(iii), p.4, *supra* n.2.

option of the user organisation; and (ii) the provision does not appear to allow for one user organisation to place supply orders against rate contracts established by *other* user organisations, but *only* against a rate contract established by a CPO. Separately, certain recent CVC instructions[49] that apply uniformly to government departmental purchases as well as purchases by CPSEs, to the extent that they cast aspersions only purchase orders placed by one government organisation/ PSE on another followed up by single source procurement without any "value-addition" in the process, could be interpreted to imply that *interagency contracting* – a key feature of some joint purchasing agreements – is perhaps also not really prohibited under the CVC guidance.

Read together, these two instructions issued independently by the Ministry of Finance and by the CVC appear to have a small area of divergence: as per CVC instructions, one government department/ CPSE can nominate another government department/ CPSE for undertaking its procurement activities so long as the order receiving government department/ PSE conducts its procurement in an open and competitive manner, presumably also through open and competitive framework agreements; while the Ministry of Finance guidance only allows a designated CPO to undertake procurement actions on behalf of a government department, without clarifying what rules are to be followed in respect of collaborative purchases between CPSEs.

5.2 The Competition Law Position

Under Indian law, insofar as horizontal co-operation is concerned, any agreement entered into between enterprises/ associations or any other enterprises, which, *inter alia*: (i) directly or indirectly determines purchase prices; (ii) limits of controls the production, supply, markets or technical development of services; (iii) shares markets by way of allocation of geographical area or number of customers; or (iv) directly or indirectly results in bid rigging or collusive bidding, shall be *presumed* to have an appreciable adverse effect on competition and shall be void[50], with the exception of agreements by way of joint ventures if such agreements increase efficiencies in acquisition of goods or services[51].

Under this rule, it would appear that collaborative procurement amongst competitors by way of joint purchasing agreements through a joint tender – an exercise that *inherently* involves the fixation of a common price of procurement of supplies by participating members – would be presumed to have an appreciable adverse effect on competition and shall be void under a *per se* approach[52]. On the other hand, collaborative procurement through joint ventures, if such arrangements increase efficiency in acquisition of goods or services, shall not be presumed to have

[49] Central Vigilance Commission (2012), *Transparency in Works/ Purchase/ Consultancy Contracts Awarded on Nomination Basis – Reg.*, http://cvc.nic.in/181212_12122012.pdf.
[50] §3(3), Competition Act 2002 (Act No. 12 of 2003).
[51] *Proviso* to §3(3), *supra* n.50.
[52] This legal position under Indian law is not different from the legal position for joint tenders in South Africa; Fiandeiro *et al*, *supra* n.23.

an appreciable adverse effect on competition, and would therefore need to be analysed for potential anti-competitive effects under a "Rule of Reason" approach[53]. Also, joint purchasing agreements that contain elements of exclusive supply agreements and "refusal to deal" agreements are void[54] under Indian law if they can be shown, under a "Rule of Reason" approach, to result in appreciable adverse effect on competition in India.

In respect of vertical co-operation, the competition law in India prohibits, inter alia: (i) imposition of unfair or discriminatory conditions in purchase or sale of goods or services, or imposition of unfair or discriminatory price in purchase of goods or services; (ii) arrangements that result in denial of market access in any manner; and (iii) use of the dominant position of one enterprise or group to enter into another relevant market[55]. Joint purchasing agreements that incorporate these elements would therefore be anti-competitive under a "Rule of Reason" approach; and to the extent that the competition law in India does not exclude public entities from its coverage[56], collaborative public procurement in India would also be subject to the aforesaid analysis on both horizontal and vertical co-operation aspects.

5.3 The Competition Case Law Position

There appears to be no case law in India dealing with collaborative public procurement, between government departments *inter-se* from a competition law perspective. However, in the context of joint purchasing agreements between CPSEs that can be competitors in the commercial marketplace, majority opinions in the only two cases[57] that have been settled by the competition regulator in India[58] on the subject thus far create a very different legal position, as compared to the strict position in law described in the preceding section. For instance, majority opinions in both these cases did not adopt a *per se* approach in analysing the anti-competitive effects of joint purchasing, and therefore closed both cases *without* specifically analysing the competition law aspects of either the joint tenders issued by the OMCs or the underlying government instructions regulating prices, purchases and supplies.

A cursory review of these two cases of interest reveals the following case law conclusions for future guidance: (i) that joint purchasing by government departments/ CPSEs may not be reviewed by the competition regulator in India under the *per se* rule mandated by the competition law, but under a "Rule of Reason" analysis; (ii) that joint purchasing by government departments/ CPSEs may not be

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[53] *See*, *generally*, Competition Commission of India (2012), *Cartels*, http://www.cci.gov.in/images/media/Advocacy/Cartels2012.pdf

[54] §3(4), ibid.

[55] §4(2), ibid. *See*, *also*, Competition Commission of India (2012), *Abuse of Dominance*, http://www.cci.gov.in/images/media/Advocacy/AOD2012.pdf.

[56] §2(l), ibid.

[57] *India Glycols Ltd. vs. Indian Oil Corporation & Others*, Competition Commission of India Case No. 14/2012, Orders dated July 26, 2012, *available online* http://www.cci.gov.in/May2011/OrderOfCommission/142012.pdf; and *M/s Royal Energy Ltd. vs. M/s Indian Oil Corporation & Others*, Competition commission of India MRTP Case No. 1/28(C-97/2009/DGIR), Orders dated May 09, 2012, *available online* http://www.cci.gov.in/May2011/OrderOfCommission/MRTP1-28main.pdf.

[58] The competition/ anti-trust regulator in India is the *Competition Commission of India*, www.cci.gov.in.

put to the prescribed mandatory tests by the competition regulator in India for abuse of dominance or for agreements-in-concert with potential appreciable adverse effects on competition, even though the competition law in India, by itself, does not allow any special or deferential treatment of co-operation agreements between public entities or government-owned commercial entities.

5.4 The Comparative Situation, So Far

The strict legal situation in India on collaborative public procurement is more akin to the South African position, where joint tenders resulting in fixation of a common purchase price for supplies procured by competing entities would be deemed to be *per se* illegal. Other elements of competition law in India are more similar to the US and the EU guidance, in that aspects such as geographical distribution of buyer and seller markets, dominant positions of the buyers in the relevant markets, and arbitrary restrictions on supplier behavior, are all required to be analysed for an overall *anti-competitive effects* determination.

But the regulatory orders in the two cases dealt with so far, as stated earlier, have created an interesting situation because of the divergence between the competition law and the case law in India. The *India Glycols* case, for instance, probably contained a significant number of important tender design issues with potentially anti-competitive effects as commonly understood in academic literature on the subject, for instance: (i) dominance of buyers in both input markets as well as in output markets; (ii) consumer expectation of competition between the dominant buyers in the commercial market place (the downstream market); (iii) mandatory (involuntary) participation of dominant buyers in the scheme with pre-fixed purchasing commitments; (iv) sharing of commercially sensitive information amongst the members of the buying group; (v) artificial geographical market segregation and similar unilateral restrictions imposed on suppliers during the contract finalisation process; (vi) denial of responses to tender queries by the purchasing entities unless such queries were *jointly* raised by suppliers; (vii) invitation of expressions of interest from suppliers without intimating in advance intended purchase prices or specific quantities to be allocated to each participant, and subsequent restrictions on future participation of any respondents who choose not to sign final contracts if the purchase prices unilaterally mandated or quantities unilaterally allocated by the OMCs were unacceptable to ethanol suppliers; and (viii) arbitrary and non-monitorable restrictions on use of transport assets by suppliers during return trips[59].

[59] These possibilities have been extrapolated by the author from a joint reading of the underlying purchasing framework on ethanol purchase by OMCs (http://www.pib.nic.in/newsite/erelease.aspx?relid=89270) and a subsequent joint EOI issued by OMCs, specifically, EOI No. Ethanol/ Industry/2012-2013 (copy available with author), presuming that similar tender design defects would have existed in the relevant joint EOI invitation as well. The identified potential competition design defects in the joint EOI listed earlier are *in addition to* other procurement design defects noticed in the EOI, for instance, the EOI under reference contained the following elements that could be problematic from a purely procurement rule perspective: (i) invitation of expressions of interest from suppliers without intimating in advance intended purchase prices or specific quantities to be allocated to each participant; (ii) non-specification of the pricing formula that would govern ethanol supplies upon changed specifications; (ii) non-specification of specific delivery schedules other than mentioning the total annual requirement per annum at various depots; (iii) restrictions on offerors to make any individual queries, presumably even genuine ones; (iv) seemingly contradictory clauses on supplier responsibility in the event of non-issue of movement permits by State Excise

6. RECOMMENDATIONS

A comparative review of the Indian legal position and case law on collaborative procurement suggests that the time may perhaps be ripe for regulators to issue explicit guidance on joint purchasing agreements, on the same pattern as in the US and in the EU that have issued detailed, explicit guidance on joint purchasing agreements. This task could perhaps be undertaken jointly by the Ministry of Corporate Affairs and the Competition Commission of India; and may perhaps involve altering the legal position by allowing the application of a "Rule of Reason" approach rather than a *per se* approach for *anti-competitive effects* determination. In addition, insofar as collaborative procurement between government agencies or government-owned entities, there appears to be an emerging, definite need for clearer and more coherent instructions on the subject, as the existing guidance under procurement rules issued by the Ministry of Finance is far too limited to effectively address the important emerging issues in joint purchases by government departments/ CPSEs, and as stated earlier, may not always tally with the advisories independently issued by the CVC.

7. CONCLUSIONS

Joint purchasing by public entities can have beneficial effects in terms of lower procurement costs and other efficiencies that can be passed on directly to consumers of public services, or indirectly to citizens in the form of reduced public expenditure. At the same time, the design of underlying public policies and procurement processes for collaborative procurement would need to undertaken with due diligence, as it is imperative for the cumulative scheme to stay clear of any adverse competition law concerns.

A proper study and understanding of joint purchasing agreements is therefore important from strictly legal perspectives, as quite apart from liabilities of joint collaborators under the competition laws arising out of the collaborations being held to be anti-competitive, the collaborating entities could face additional legal consequences, since if the objective of a joint purchasing contract violates the relevant competition law, then the underlying agreement itself may be *void ab initio* in terms of the contracts law as applied in that particular jurisdiction[60].

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authorities; (v) prohibitions on sub-letting of the contract eventually awarded but permission to execute an irrevocable power of attorney to be executed by suppliers allowing *de facto* sub-letting of the supplier's performance obligations under contract; and (vi) permitting individual OMCs to recover pending dues/ penalties of other, unrelated contracts executed by a supplier with the same or any other OMC while receiving payments for supplies against the ethanol contract(s). In addition, the majority order in the *India Glycols* case notes that the *Cabinet Committee on Economic Affairs* is the *apex body for deciding the prices of commodities for procurement and supply by the Government of India*—a statement that is different from the procurement rule stipulation in India assigning this role specifically to designated *Central Purchase Organisations*- a problem that could get further compounded in view of the fact that procurement in the *India Glycols* case was not being undertaken by departments or offices of the Government of India, but by *government-owned commercial companies incorporated as distinct legal entities*.

[60] For instance, under Indian contract law, an agreement is *void ab initio* if it is made with an unlawful object; §2(g) *read with* §10 and §24, Indian Contract Act, 1872 (Act No. 9 of 1872).

Research into anti-competitive effects of joint purchasing could also inform our understanding of *State-run* or *State-sponsored cartels* such as standardisation cartels in the EU[61] that operate by getting the EC to impose health and environmental restrictions that discriminate against foreign bidders and foreign technologies, or *Military-Industrial cartels* in the US that survive because of, *inter alia*, extreme "Buy American" requirements and subjective methods of public procurement such as competitive negotiations[62]. On the other hand, a proper understanding of joint purchasing arrangements could also inform public policy formulation particularly in countries with relatively poorer policy-making, accountability and oversight mechanisms, where joint purchasing could be a completely artificial cover for artificial government intervention, using its control over government entities and SOEs to cause undue benefits to private monopolistic/ oligopolistic suppliers.

In the near future, an important constructive outcome of intensive research in this area could be useful in the context of international co-operation in cartel-prevention, as the present national or regional frameworks, for instance in the EU, appear to permit joint purchasing arrangements as long they cause competitive harm only to foreign economic entities[63]. The OECD has already taken initial steps[64] for establishing international cooperation in cartel investigations; and legal studies on collaborative public procurement, both from a procurement law as well as from a competition law perspective, could significantly inform this important emerging engagement.

The biggest gainers in this process of alignment of public procurement rules with competition law issues would be developing countries themselves, as collaborative procurement could be an important strategic tool of public policy in their efforts at containing domestic as well as international cartels active both in raw materials markets and in production markets, for the end-purposes of obtaining proper economic gains for consumers of public services and for citizens, through an intermediate process of removing artificial obstacles to their industrial development.

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[61] *State Cartel Theory*, Wikipedia, http://en.wikipedia.org/wiki/State_cartel_theory.
[62] *See*, *e.g.*, Verma, S. (2013), *Too Big for the Recycle Bin: A Procurement Insight into the Latest USTR Report*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251199.
[63] Ashurst, p.5, *supra* n.42.
[64] OECD (2012), *Policy Roundtables: Improving International Co-operation in Cartel Investigations*, http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.