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“Damage claims in competition matters: The dawn of a new era?”

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Litigation Commission

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QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

The primary authority for enforcing competition law in India is Competition Commission of India.

The Competition Commission of India (“**CCI**”) can initiate action on the basis of information and knowledge in its possession (*suo-moto*), or on receipt of information or reference from any person, consumer or their association, trade association or a reference by the central government, state governments or any statutory authority. The Competition Act, 2002 (“**Act**”) defines a ‘person’ to include an individual, a firm, an association of persons or a body of individuals, whether incorporated or not, in India or outside India.

The concept of private enforcement of an anti-trust damage claim in India is limited to the extent of providing damages and grant of injunctions to the affected parties. However, in case of claim for damages for performance of contracts can be claimed in civil proceedings in addition to seeking reliefs from the CCI.

As regards arbitrability of an anti-trust claim, the situation in India is very different from US and UK where flexibility is provided to use arbitral process.

2. *[For EU Member States]* Has your country already implemented/started implementing the private enforcement Directive?

Not Applicable

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

- a) Is there a specialized court specifically for antitrust based claims?

The CCI and the Competition Appellate Tribunal (“**COMPAT**”) are specialised foras for adjudicating practices having appreciable adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India in the public domain but not a means for private enforcements. The practice of private enforcement of competition law claims is fairly nascent in India.

- b) May the court impose interim measures?

CCI has the powers to impose interim measures. Additionally, CCI may, by order, temporarily restrain any party from carrying on such acts until the conclusion of such inquiry or until further orders. However, this power has to be exercised by CCI sparingly and in compelling and exceptional circumstances.

- c) May the trial proceed in parallel and independently of a National Competition Authority investigation?

The CCI is the only body authorised under law to examine competition law issues. In respect of all other issues, a civil suit may be filed and trial can proceed simultaneously with the action for competition violation.

The Act excludes the jurisdiction of civil courts to entertain any suit or proceeding in respect of any matter which the CCI or the COMPAT is empowered to determine. No injunction can be granted either.¹

- d) Is the decision subject to appeal?

The decisions of the CCI can be appealed to the COMPAT. Such appeal is admissible both on facts and law. Further, any person aggrieved by any decision or order of the COMPAT may file an appeal to the Supreme Court of India within sixty days. Thus, there exists a two tier appeal process in India when it comes to public enforcement however, due to absence of any specialized courts there does not exist any separate process for private enforcement of competition law claims.

If there is a patent illegality in the order of CCI or violation of principles of natural justice, an order of CCI can be challenged before a High Court invoking its writ jurisdiction as well.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an “anchor defendant” sufficient (*cf* ECJ, C-352/13))?

Any person irrespective of nationality can file information before the CCI. As mentioned earlier, a ‘person’ includes an individual, an association of persons or a body of individuals, whether incorporated or not, in India or outside India and any body corporate incorporated by or under the laws of a country outside India. CCI also has the power to inquire into agreements or abuse of dominant position or regulate combinations taking place outside India but having an appreciable adverse effect on competition in the relevant market in India under Section 32 of the Act.

¹ Section 61, Competition Act, 2002

The Act by allowing CCI to exercise extraterritorial jurisdiction has made it possible for CCI to take action against anti-competitive conduct involving imports, and foreign cartels which may adversely affect the Indian market. Since no law or jurisprudence has evolved on private action in India, the issue of jurisdiction has not been tested.

There is room for forum shopping by initiating actions in consumer forums and actions for contractual breach in civil courts involving competition law issues in case of “consumer”. As discussed above, there is an additional remedy of a writ petition in case there is any violation of legal or fundamental rights from any administrative action of a governmental authority.

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

No time-line can be specified considering no regime has been developed for anti-trust private enforcement action in India. Also nothing is provided under the Act for private enforcement action by CCI.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

Each party bears its own legal and representation costs. There has been no instance where CCI or COMPAT have ordered the losing party to pay the costs of the winning party in cases of anti-trust enforcement by them.

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?

There are no rules on alternate funding options of fee arrangements in India. The law prohibits lawyers from charging contingent fees. While there is no legal bar to securing funding for litigation (domestic), there is no precedent in the context of competition law enforcement, particularly in the context of recovery of damages etc.

The Act and rules existing in India does not provide for any assignment/bundling of claims allowing third parties to buy claims from cartel victims.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?

The scope of ‘person’ who can file information include inter alia an association of persons or a body of individuals, whether incorporated or not, in India or outside

India or a co-operative society registered under any law relating to cooperative societies. There are instances where the complaint was initiated by such entities.

Section 53N(4) of the Act states that where any damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of COMPAT make an application to claim for compensation, for and on behalf of, or for the benefit of, the interested persons.

Further, under the Consumer Protection Act, 1986 a consumer/group of consumers can claim damages collectively against the service provider in the event their actions are oppressive and against the interest of the consumers.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular?

India follows doctrine of precedents and stare decisis. The Commission is bound by its earlier rulings. CCI does look at its past decisions while adjudicating.

10. What are the relevant limitation periods (taking into account question 9 above)?

There is no limitation period prescribed under the Act for initiating private anti-trust claims. However, the Indian courts and tribunals generally follow an approach of 'reasonableness' only when no limit has been prescribed under the applicable statute.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

There is no thumb rule as to the lifting of corporate veil; much depends on the circumstances of each given case. Parent entity can be held liable and responsible for the anti-competitive conduct of their subsidiaries by relying on the doctrine of lifting the corporate veil in exceptional cases. There is no express provision under the Act or powers vested with the CCI to hold the parent liable for the acts or infringement committed by the subsidiaries. The doctrine of lifting of corporate veil is employed in rare cases namely for the purposes of preventing a fraud or tax evasion by the corporate entity.

The proviso to Section 27 of the Act uses the term "group", albeit its interpretations should be limited to those members of the group that are responsible for, or have contributed to, the contravention of the Act.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

Since the jurisdiction of civil court is barred by the Act, it is not possible for the civil courts to adjudicate antitrust infringements.

As regards anti-trust infringement under the competition laws in India, on one hand no monetary limits are prescribed for claiming damages against cartel participants in India and on the other hand the same also has not been tested. Accordingly general principles on joint and several liability under Indian Contract Act should be applicable.

Usually all cartel participants are ordered to pay penalty based on their turnover or profits made.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

The Act empowers CCI to receive and admit documents and evidence on the basis of evidentiary principles of the Civil Procedure Code and the India Evidence Act. The issues such as pre-trial discovery and legal privilege are also governed by the aforementioned principles and exceptions.

Regulation 35 of the Competition Commission of India (General) Regulations, 2009 provides that confidential information or documents should be secured in a sealed envelope or container marked "confidential record under Regulation 35" along with the date until which the information must remain confidential.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

CCI is quasi-judicial authority in nature. The Act grants CCI the same powers as are vested in a civil court. Therefore, CCI has same powers as the civil court namely to summon and enforce the attendance of any person and examine him on oath; require the discovery and production of documents; receive evidence on affidavit; issue commissions for the examination of witnesses or documents, and requisition any public record or document or copy of such record or document from any office.

CCI may also direct any person to produce books or other documents in the control of such person, being documents relating to any trade, the examination of which may be required for the purposes of this Act. It may also order furnishing of information relating to the trade or for any other purposes of the Act. The Director General (appointed for the purposes of assisting CCI in conducting inquiry) can also undertake unannounced search and seizure operations, for the

purpose of collecting evidence and documents during the course of its investigation and also conduct search and seizure the premises.

Additionally, regulation 37 of the General Regulations allows for inspection of documents or records submitted during proceedings to any third party who makes an application to CCI demonstrating sufficient cause for making such a request. However, access to documents or records excludes internal documents of the CCI.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

The claimants have complete access to CCI's records with respect to filings made by parties and can inspect the same during the pendency of investigation under Regulation 14 (7) (j) of the Competition Commission of India (General) Regulations, 2009 ("**Regulations**") excluding the internal communication of CCI. The investigation report of Director General is not available publicly but only provided to the parties whereas all the orders are freely available, both offline and online. Further, the CCI upon cogent reasons being shown by the parties may grant confidential treatment to certain parts or complete filed which needs to be treated as 'confidential' as required under Regulation 35 of the Regulations.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Indirect purchasers may be able to claim compensation in anti-trust cases since nothing in the Act prevents an indirect purchaser from bringing a damage claim. An indirect purchase will have to demonstrate the loss or damage suffered as a result of anti-competitive activities of the seller but in the absence of any jurisprudence, it remains to be seen how the CCI entertains such indirect claims.

While there is no statutory mechanism, it may be permissible for them to recover such costs through tortious claims. However, this area of jurisprudence is yet to evolve in any significant manner in India.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

"Umbrella damages" may not be awarded by the Indian courts due to the remoteness of damage.

18. Is the passing-on defence allowed?

Passing on defence is not recognised in India.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

India has not seen any claims for private enforcement of anti-trust claims or any compensation being granted by any courts. As a result there is no precedent reflecting compensatory damages being awarded for anti-trust violations.

Under Section 53 of the Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the COMPAT for any loss or damage suffered, by the above bodies as a result of any anti-trust infringement under the Act. The enquiry conducted by COMPAT shall be for the purposes of determining the eligibility and quantum of compensation due and not for examining afresh the findings of CCI or COMPAT on whether any violation of the Act has taken place.

Further under Section 53N(4) of the Act states that where any damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of COMPAT make an application to claim for compensation, for and on behalf of, or for the benefit of, the interested persons. Two cases adjudicated by COMPAT (*Amit Jain v. DLF and MCX v. NSE*) have been filed before COMPAT for claims of compensation and loss suffered. In the MCX case especially, damages of approx. EUR 80 million has been claimed. The onus of proving loss or damage suffered as a consequence of the contravention of the provisions of the Act vest with the party making the application. The probability of being awarded the amount claimed depends on the actual loss or damage suffered and the evidence adduced by the party. Both the cases are pending adjudication by COMPAT as a result no mechanism for grant of compensation has evolved in India.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

Since private enforcement of anti-trust claims is unheard in India, the aspect of burden of proof has not been tested. However in case of applications filed for compensation under Section 53N of the Act, the burden of proof would be on the applicant to prove the loss or damage suffered due to anti-competitive acts or abuse of dominant position by the enterprise.

21. Is there a difference between stand alone and follow-on actions?

The difference between stand alone and follow-on actions is not recognised and applicable in India.

22. How is damage quantified?

There is no Indian jurisprudence on quantification of damages yet as both the cases filed COMPAT on compensation for loss and damages are pending. Therefore, no procedure or method has been specified under the Act for quantification of damages and in the absence of precedents it will be difficult to assess the same.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

Under the Act, the only defence that may be taken by the opposite party would be that the activity does not create any appreciable adverse effect on the market. Since private enforcement does not exist in the traditional form in India, it needs to be tested what defences may be allowed by courts.

24. What is the role of economic experts, if any?

The economic experts are part of the selection committee for the members of CCI. CCI is composed of members having professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management as well as public affairs. CCI while publishing the DG Report significantly relies on the economic analysis to understand the conduct and behaviour of parties and is required to prove the existence of a cartel to demonstrate whether the parties to the alleged agreement were in fact competing or not. Additionally, CCI's extensive reliance on economic analysis can be seen in several cases where details with respect to production data, distribution and dispatch network, cost of production, capacity utilization and export projections for a period of three years have been analysed to understand impact and if any appreciable adverse effect caused on competition.

Thus economic analysis and reports submitted play a crucial role in the investigation process as well as in defending claims of parties. Thus, economic experts play a crucial role in adjudication of CCI matters. Often expert evidence is submitted by parties during the course of proceedings which play an important role in adjudicating cartel claims. CCI also engages the services of economic experts to assist the Commission. Such assistance may be ad-hoc or full time.

25. What other types of experts are typically engaged in your jurisdiction?

Typically, experts of repute who have special knowledge and experience in international trade, economics, business, commerce, law, finance, accountancy,

management, industry, public affairs or competition law and policy are engaged in India.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

Not applicable, in view of answer to question 21. Fines are imposed on the basis of standards laid down in the Competition Act, 2002.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Arbitrability of antitrust disputes is not explored in India. It is safe to conclude that such matters are not arbitrable. The Delhi High Court in *Union of India v. CCI* while examining the issue of existence of an arbitration agreement between the parties held all issues to be raised before the CCI as the scope of proceedings before CCI were entirely different from contractual obligations dealt before an Arbitral Tribunal and Act had overriding effect over all other laws. Further, an Arbitral Tribunal decides in light of contractual clauses and does not look into aspects of abuse of dominance. The Delhi High Court held that the Arbitral Tribunal does not have the mandate, neither the expertise, nor the ability to conduct an investigation necessary to decide issues of abuse of dominant position by one of the parties to the contract. In view of the above, disputes on abuse of dominance was held non arbitrable

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

While parties may settle, CCI will have final say since this is a matter of public importance.

The settlement regime in the context of anti-trust issues is not developed in India. Recently, the Madras High Court in *Tamil Nadu Film Exhibitors Association v. CCI & Ors*² held that it is possible within the framework and scheme of the Act to allow settlements and compromises to be reached between parties. However, CCI should be of the view that such settlements and compromises-

- (1) would not lead to the continuance of anti-competitive practices;

² 2015 Comp LR 420(Madras)

- (2) would not allow the abuse of dominant position to continue; and
- (3) would not be prejudicial to the interest of consumers or to the freedom of trade.

CCI also runs a Leniency Programme to protect the information providers. The CCI may, if it is satisfied that any entity included in any cartel has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such entity a lesser penalty. Detailed rules have been laid down vide Competition Commission of India (Lesser Penalty) Regulations, 2009 in this regard. This reduction in penalty may be upto or equal to 100 percent.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.
1. The CCI has heard numerous complaints filed by individuals recently. The informants, in these cases, were as diverse as a lawyer³, buyer of a residential property⁴, a resident welfare association⁵, an employee of a company⁶ and a member of an association of professionals⁷.
 2. In *Belaire Owners' Association vs. DLF Limited & Ors.*⁸, CCI took cognizance of information furnished by a residents association and imposed penalties on the real estate giant DLF. The informant had alleged that DLF abused its dominant position and imposed highly arbitrary, unfair and unreasonable conditions on the informant through its agreements.
 3. The Commission in Coal India case⁹ dealt with the anti-competitive practices adopted by Coal India and its subsidiaries. CCI based on the market share of Coal India concluded that prima facie Coal India was in a dominant position in the relevant market. The decision has been challenged however it is significant from a jurisprudential perspective stating that policies by government bodies of "take it or leave it" will not be countenanced by CCI. The burden of proof will be on parties that enjoy a dominant position to demonstrate that terms in an agreement are reasonable and not imposed on parties.
 4. In *BCCI v. CCI & Anr.*¹⁰, the COMPAT set aside the decision of CCI on grounds of natural justice and unsubstantiated findings as the information downloaded from

³ Vivek Sharma v. M/s Becton Dickinson India (P) Ltd. and Anr. Case No. 77 of 2015

⁴ Naveen Kataria v. M/s Jaypee Greens, Case no. 99 of 2014; Vijay Kapoor v. DLF Universal Ltd., Case no. 84 of 2014

⁵ Sunrise Resident Welfare Association v. Delhi Development Authority, Case No. 88 of 2014

⁶ Saurabh Tripathy v. Great Eastern Energy Corporation Ltd, Case No. 63 of 2014

⁷ Mr. Arun Anandagiri v. The Institute of Chartered Accountants of India, Case No. 93/2013

⁸ Case no. 19/2010

⁹ Case Nos. 59 & 88 of 2013 decided on October 27, 2014

¹⁰ Appeal No. 17 of 2013 decided on April 27, 2015

the internet and other similar sources do not have any evidentiary value. The merits of the matter were not considered by COMPAT and remanded it back to CCI for fresh disposal.

5. CCI recently imposed a penalty of INR 6.69 billion on four public sector insurance companies for causing an appreciable adverse effect on competition in the health insurance sector. The actions and decisions taken by public sector companies in submission of financial bids demonstrated a clear bidding pattern.
6. Recently, the Madras High Court in *Tamil Nadu Film Exhibitors Association v. CCI & Ors.*¹¹ held that it is possible within the framework and scheme of the Act to allow settlements and compromises to be reached between parties.
7. The Commission recently imposed a penalty of INR 2.58 billion on three airline including Jet Airways, Inter-Globe Aviation Limited, the parent company of IndiGo Airlines and SpiceJet Limited for engaging in concerted action to impose fuel surcharge on air cargo transport companies and causing an appreciable adverse effect on competition in the air cargo industry.

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¹¹ 2015 Comp LR 420(Madras)