

Private Antitrust Litigation

Contributing editor
Samantha Mobley



2016

GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Private Antitrust Litigation 2016

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India

Alok Dhir and Sachin Gupta

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The main objective of Parliament in enacting competition laws was to take measures to avoid agreements that were anti-competitive in nature and stop abuse of position by dominant players in the market, as well as to regulate mergers and takeovers that would have adverse effects on the market.

The earlier antitrust law (namely the Monopolies and Restrictive Trade Practices Act, 1969 (the MRTP Act)) was found to be inadequate as well as obsolete in contrast to the development of competition law in the international market.

It was further observed that the main objective behind international competition law was that the allocation of resources should be determined solely by the supply and demand ratio of those resources and that the ultimate benefit should go to the society at large.

In India, post the MRTP Act, a High Level Committee for competition policy and law was constituted to examine the various aspects and suggestions, keeping in view the economic policy of India. Further, on 12 December 2003 the Competition Act, 2002 was enacted. According to the objects and reasons of the said Act, this enactment was India's answer to the opening up of its economy, removing controls and resorting to liberalisation. The intention of the bill was to ensure fair competition in India so that the Indian economy was geared to face competition within the country as well as outside it.

The other object was to curb the negative aspects of competition. To counter the same a body was established, namely the Competition Commission of India, which was conferred powers to perform different kinds of functions, including passing of interim orders and imposition of penalties on entities indulging in anti-competitive activities. Further, a Director General has also been appointed under the provisions of section 16(1) of the Act for the specialised investigating wing of the Competition Commission of India.

In short, the establishment of the commission and enactment of the Act was to prevent practices having adverse effect on competition, to protect the interest of the consumer as well as to ensure fair trade between participants in the Indian market and also the matters connected therewith or incidental thereto.

Sections 3 and 4 of the Competition Act, which deal with anti-competitive agreements and abuse of dominant positions, were notified on 20 May 2009 and do not have retrospective effect. Therefore, any act or conduct by any enterprise prior to 20 May 2009 that is in violation of the Competition Act is not covered within the jurisdiction of the Competition Act and the CCI cannot impose any penalties. However, any continuing action, agreement or conduct (that started prior to 20 May 2009 and continued on or after 20 May 2009), which has an appreciable adverse effect on competition or is in violation of the Competition Act can be investigated by the CCI and the CCI shall have the power to penalise the parties found to be in violation. The Competition Act also provides for private antitrust litigation in India.

Under the Competition Act any person, whether consumer, trade association, central or state government, local authority, or enterprise can make an application for compensation resulting from an infringement or violation of the Competition Act (covered under Chapter II of the Competition Act) or compensation of any loss suffered on account of

the contravention of any orders of the CCI or the Competition Appellate Tribunal (COMPAT). Section 19(1)(a) empowers any person, consumer or association to file information with the CCI with respect to any (alleged) contravention of the Competition Act. The orders passed by the CCI are appealable before the COMPAT (under section 53B of the Competition Act) and the final appeal against the order passed by the COMPAT can be made before Supreme Court (section 53T of the Competition Act).

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

The private antitrust actions are mandated by statute. Section 19(1)(a) of the Competition Act empowers the CCI to inquire into the alleged contravention of provisions specified in section 3 (anti-competitive agreements) or 4 (abuse of dominant position) either on its own motion or on receipt of information from any person, consumer or their associations or trade associations. Therefore collective action can be taken by an association of consumers, trade associations, associations of persons or body of individuals, cooperative society, Hindu undivided family, non-governmental association or trust. Further, section 53N of the Competition Act provides for private action for damages. Central or state government, local authorities, enterprises or persona may make an application to the COMPAT to adjudicate on a claim for compensation.

In addition, under sections 42A and 53Q(2) of the Competition Act, a claim for compensation can be made before the COMPAT for any losses suffered due to the failure of an enterprise to comply with the orders of the CCI or the COMPAT itself. The Competition Act does not, either by reference or incorporation, provide for any period of limitation for the purposes of filing an application under section 42A or 52Q(2) of the Competition Act.

The claimant may include any person or consumer, both of which have been widely defined in the Competition Act. A consumer includes direct and indirect purchasers, irrespective of whether the purchase is for personal or commercial use or resale.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The Competition Act is the relevant legislation governing antitrust actions and litigation. Additionally, compensation applications under sections 53N, 42A or 53Q(2) are subject to the Competition Appellate Tribunal (Procedure) Regulations, 2011 and the Competition Appellate Tribunal (form and fee for filing an appeal and fee for filing compensation applications) Rules, 2009. Section 19(1) of the Competition Act empowers the CCI to initiate inquiry into agreements and the dominant position of an enterprise (either on its own or upon receipt of information or reference). As mentioned above, application for compensation can be made before the COMPAT under section 53N of the Competition Act. Application can also be made to the COMPAT seeking compensation from any enterprise for any loss or damage shown to have been suffered, by the central government or a state government or a local authority or any enterprise or person as a result of any contravention of the orders of the COMPAT or the CCI.

Under section 53B of the Competition Act an appeal can be made by any person aggrieved by the order or decision of the CCI to the COMPAT within a period of 60 days from the date of communication of the decision or order of the CCI. Further, an appeal can be made by anyone aggrieved by the order or decision of the COMPAT to the Supreme Court of India within a period of 60 days from the date of communication of the decision or order of the COMPAT.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

The private antitrust action can be initiated against any company, enterprise or association that has been involved in the abuse of a dominant position, an agreement resulting in bid rigging or collusive bidding, anti-competitive agreements (including combinations resulting in an appreciable adverse effect on competition) for claiming compensation or recovery of damages caused and for not following the orders or the decision of the CCI or the COMPAT.

Private antitrust action covering claims of compensation etc can be initiated subsequent to an order of the CCI finding contravention of provisions of Chapter II (including anti-competitive agreements, abuse of dominant position and combinations) of the Competition Act or an order of the COMPAT, in appeal, affirming such findings passed by the CCI.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

An enterprise (including the government, a person or an association) may file an application (in the prescribed manner) before the COMPAT for an award of compensation by establishing loss or damage suffered by the applicant. Since, the CCI is a central body with jurisdiction across India, any aggrieved party having suffered loss or damage in India (occurring because of anti-competitive activity or non-compliance with the order of the CCI or the COMPAT) may file an application before the COMPAT.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

The private actions can be brought against both corporations as well as individuals only if the violation is found to have occurred in India and the order with respect to the same has been passed by the CCI. Section 2(l) of the Competition Act defines persons against whom action can be taken and they include individuals, Hindu undivided families, companies, firms, associations of persons or bodies of individuals (whether incorporated in or outside India) and any body corporate (incorporated by or under the laws of a country outside India). The scope of the Competition Act is limited to anti-competitive practices that have an appreciable adverse effect in India.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

The Competition Act does not make any provision for funding by third parties. The court fee payable by the applicant filing the compensation application is provided for in the Competition Appellate Tribunal (form and fee for filing an appeal and fee for filing compensation applications) Rules, 2009. These rules prescribe the court fee for compensation applications in terms of the amount of compensation claimed by the applicant.

| Compensation claimed | Court fee payable |
|--------------------------|---|
| Less than 100,000 rupees | 1,000 rupees |
| More than 100,000 rupees | 1,000 rupees plus 1,000 rupees for every additional 100,000 rupees or compensation claimed or fraction thereof, subject to a maximum of 300,000 rupees. |

8 Are jury trials available?

Jury trials are not available in India. Compensation cases are heard before the COMPAT, which comprises three members, including the chairperson (who is a retired Supreme Court judge or chief justice of a High Court). Also, it is pertinent to clarify that recently initiated or filed competition cases are heard before the CCI, which comprises seven members. The members are selected from the various fields and have experience in any of the following - international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition.

9 What pretrial discovery procedures are available?

The Competition Act does not provide for any pretrial discovery procedures. Any evidence is collected by the director general of the CCI and is used while preparing the report and the report, along with the collected evidence, is placed before the CCI, and is then made available to all the concerned parties.

10 What evidence is admissible?

The Indian Evidence Act, 1872 (the Evidence Act) governs the admissibility of evidence. Types of evidence that are admissible include pre-existing evidence (including information under section 19(1) or information in the public domain); evidence such as compulsory requests based on an inquiry under section 36(2); evidence from experts under section 36(3),(4) and (5); and evidence from search-and-seizure procedures under section 41(3). Categories of evidence admissible can be documentary, oral, economic (such as market assessment or demand and supply) and financial (such as financial statement) analysis.

In terms of compensation applications before the COMPAT, the enquiry shall rely on the determinations and findings by either the CCI or the COMPAT.

11 What evidence is protected by legal privilege?

The Evidence Act protects legal privilege (sections 126 to 129). A 'privileged professional communication' is protection awarded to communication between the legal adviser and the client.

Section 126 of the Evidence Act provides the scope of privilege attached to professional communication in an attorney-client context. It restricts attorneys from disclosing any communication exchanged with the client or stating the contents or condition of documents in possession of the legal adviser in the course of the latter's employment by the client.

This section also provides certain exceptional grounds on which such privilege shall be denied that show that either crime or fraud has been committed since the commencement of the attorney's employment on the concerned matter. It is immaterial whether the attention of the attorney was or was not directed to such fact by or on behalf of his or her client.

Section 127 of the Evidence Act extends the privilege provided under section 126 to the interpreters, clerks and employees of the legal adviser. Section 128 of the Evidence Act continues to bind the legal adviser from disclosing any information covered under section 126 of the Evidence Act unless the client calls the legal adviser as a witness and questions him or her on the information.

Section 129 of the Evidence Act establishes that no one shall be compelled to disclose to the court any confidential communication that has taken place with his or her legal professional adviser, unless the latter offers himself or herself as a witness.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

The Competition Act (under section 42(3)) provides for imprisonment that may extend up to three years, in the event of non-compliance with CCI orders. Further, section 42A provides for compensation in case of contravention of the orders of the CCI. However, there is no explicit limitation under the Competition Act prohibiting the initiation of any private action if there has been a criminal conviction with respect to the same matter.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

In terms of the Competition Act, any application made for compensation in parallel private antitrust actions may be made only after either the CCI or the COMPAT has determined in a proceeding before it that the violations of the provisions of the Competition Act have taken place.

Section 46 of the Competition Act as well as the Competition Commission of India (Lesser Penalty) Regulations 2009 (the Lesser Penalty Regulations) grant the CCI the power to impose lesser penalties.

It does not categorically protect leniency applicants from follow-on litigation.

Under the Lesser Penalty Regulations, an applicant shall be afforded confidentiality. The CCI shall also keep the identity of the applicant or the information obtained from it confidential and not disclose the identity of the applicant or the information obtained unless:

- the disclosure is required by law;
- the applicant has agreed to such disclosure in writing; or
- there has been public disclosure by the applicant.

Additionally, where publicly disclosing documents will result in disclosure of trade secrets, the destruction or appreciable diminution of the commercial value of any information, or can reasonably be expected to cause serious injury, an applicant may request the CCI or the director general to maintain the confidentiality of such documents. In the event that such documents form part of the applicant's written submissions, the public version of the submissions shall be an exact copy of the confidential version with the confidential information omitted.

Evidence submitted and claimed by the leniency applicant as confidential is required to be treated as such and the CCI is required by law to determine the validity and areas of confidentiality in the evidence submitted.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

If the defendant is able to establish that no loss or damage has been caused to the plaintiff by any action or contravention of the Competition Act, the defendant may be able to stay the proceedings in a private antitrust litigation.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The claimant will need to demonstrate the loss or damage suffered as a result of a contravention of the provisions of Chapter II of the Competition Act. Therefore a claimant will have to discharge the burden of showing causation and the loss or damage suffered by it in order to recover compensation. The Competition Act is silent on the standard of proof required in these cases; however, for civil claims such as these, the standard applied should be the balance of probabilities. Accordingly, the claimant must show a connection between its claim and the enterprise against which compensation is sought.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The Competition Act does not provide a specific period within which the COMPAT shall adjudicate and pass a decision in respect of an application for adjudication of a claim for compensation.

However, it is worth noting that if an entity has filed an appeal against a CCI decision holding it responsible for infringing a provision of the Competition Act, the claim for compensation can only be filed against such entity after the COMPAT has decided the appeal (if a claim is filed after the CCI decision but before an appeal has been filed, then upon the filing of such appeal, the claim for compensation shall be kept in abeyance until the disposal of the appeal).

17 What are the relevant limitation periods?

The Competition Act itself does not, either by reference or incorporation, provide for any period of limitation for the purposes of filing an application before the COMPAT to adjudicate on a claim for compensation arising

from the findings of the CCI or from the orders of the COMPAT or under sections 42A or 53Q(2) of the Competition Act.

In cases where no period of limitation is prescribed, Indian courts generally adhere to a principle known as the 'doctrine of laches', which provides that proceedings ought to have been initiated within a 'reasonable period of time' and that a failure to do so results in serious prejudice and harm to the defendant and adversely affects the ability of the defendant to defend itself. The Supreme Court of India in *Corporation Bank and Anr v Navin* held that:

the claim if at all was to be made, ought to have been made within a reasonable time thereafter. What is a reasonable time to lay a claim depends upon facts of each case. In the legislative wisdom, a three-year period has been prescribed as the reasonable time under the Limitation Act to lay a claim for money. We think that period should be the appropriate standard adopted for computing reasonable time to raise a claim in a matter of this nature. For this reason also we find the claim made by the respondent ought to have been rejected by the Commission.

18 What appeals are available? Is appeal available on the facts or on the law?

Section 53T of the Competition Act provides that the central government or any state government, the CCI, any statutory or local authority, or any enterprise or person aggrieved by a decision or order of the COMPAT may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the COMPAT.

The provision of section 53T of the Competition Act has not mentioned any specific ground for making an appeal to the Supreme Court. Thus the grounds of appeal are not restricted as in the case of the Monopolistic and Restrictive Trade Practices Act, 1969.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Yes, collective proceedings are available in respect of antitrust claims.

20 Are collective proceedings mandated by legislation?

Section 19(1)(a) of the Competition Act empowers the CCI to inquire into the alleged contravention of provisions specified in section 3(1) or 4(1) either on its own motion or on receipt of information from any person, consumer or their associations or trade associations. Therefore collective action can be taken by consumer associations, trade associations, a body of individuals, a cooperative society, a Hindu undivided family, non-governmental association or any trust.

Collective action can also be taken under section 53N(4) of the Competition Act, which provides for collective proceedings. The same can be brought by one or more persons on behalf of numerous persons with the same interest to file a class action application with the permission of the COMPAT, on behalf of or for the benefit of all the interested persons.

21 If collective proceedings are allowed, is there a certification process? What is the test?

There is no formal certification process prescribed under the Competition Act. However, section 26(1) of the Competition Act provides that upon receipt of an information under Section 19(1)(a), if the CCI is of the opinion that a prima facie case exists, it shall direct the director general to initiate an investigation into the matter.

In terms of a compensation application; if any loss or damage is caused to numerous persons having the same interest; one or more persons of such group may, with the permission of the COMPAT, make an application, for and on behalf of and for the benefit of the persons so interested; and thereupon the provisions of the Code of Civil Procedure, 1908 (pertaining to the procedure where one person may sue or defend on behalf of all in the same interest) shall apply.

22 Have courts certified collective proceedings in antitrust matters?

Since the Competition Act only came into force on 20 May 2009, no certification for collective proceedings has been concluded or reported.

Update and trends

The CCI has recently exercised its jurisdiction and directed the Director General to conduct an enquiry into the pricing model used in the setting of air fares which are alleged to be anti-competitive. Apart from the aforesaid, CCI will also be looking into the allegation that the airline companies were acting as a cartel as the fare increases and decreases were more or less the same. The CCI has in the past refrained from initiating such enquires and this is the first instance where directions have been given to the Director General to conduct an enquiry and look into the issues as enumerated above.

The CCI has recently (while proving the alleged anti-competitive or monopolistic trade practices qua the sale of automotive spare parts) permitted the Director General to enlarge the scope of investigation to cover other manufacturers of automotive spare parts apart from the three companies against whom the investigation was already proceeding. The Hon'ble High Court of Madras has recently upheld the order of the CCI and held that the relevant provisions of the Competition Act, 2002 authorise the CCI to enlarge the scope of the investigation in order to adjudicate upon the complaint before it.

23 Can plaintiffs opt out or opt in?

Yes, the plaintiff can opt out or opt into the proceedings under section 53N(4) of the Competition Act. However, if he or she opts out he or she will be not bound by the COMPAT decision on the claim. The plaintiff will not have any option to opt out of complaint filed with the CCI under section 19(1)(a) of the Competition Act. The CCI will investigate when any information with the prescribed fee is received of an alleged contravention of the Competition Act, even if the informant withdraws at a later stage (if the matter is of public interest and the CCI is of the opinion that there has been contravention of the Competition Act). In the case of opting in, any person can give additional information on the matter, which will be added to the information that has already been given.

24 Do collective settlements require judicial authorisation?

There is no settlement procedure prescribed under the Competition Act.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

India is not divided into multiple jurisdictions.

26 Has a plaintiffs' collective-proceeding bar developed?

Since the Competition Act came into force no such proceedings have been concluded and reported. As a result, no plaintiffs' collective-proceeding bar has developed.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

As mentioned in previous paragraphs, an application for compensation can be filed before the COMPAT under section 53N for compensation for loss or damage suffered by the plaintiff as a result of any contravention of provisions of Chapter II of Competition Act by the defendant enterprise. The COMPAT is then required to adjudicate on a claim for compensation that may arise from the findings of the CCI or the orders of the COMPAT itself in an appeal.

Compensation, under section 42A of the Competition Act, can be recovered for any loss or damage shown to have been suffered by the plaintiff due to contravention of the orders of the CCI by the defendant. Since the key provisions of the Competition Act came into force only in 2009, there are no decisions or orders by the COMPAT on any application for adjudication of a claim for compensation. Furthermore, compensation can be claimed under section 53Q(2) of the Competition Act if any loss or damage is shown to have been suffered by such person as a result of the inability of the judgment debtor to comply with the orders of the CCI.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Under section 33 of the Competition Act the CCI can, if it is satisfied that an act is in contravention of section 3(1), section 4(1) or section 6 has been committed and is continuing to be committed or is about to be committed, order the temporary restraint of any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

For obtaining relief under this section usually the informant must file an application praying for such relief and though the Competition Act is silent about the test that is to be applied in reviewing such application, the CCI indicates that the general civil law principles of irreparable or irretrievable harm are used.

Additionally, section 53U of the Competition Act authorises the COMPAT to punish for contempt as per the provisions of the Contempts of Courts Act, 1971.

29 Are punitive or exemplary damages available?

The Competition Act empowers the CCI to impose penalties for failing to comply with its orders. Also, as mentioned above, any person or enterprise may file an application before the COMPAT for recovery of damages.

30 Is there provision for interest on damages awards and from when does it accrue?

There is no provision for interest on damages under the Competition Act.

31 Are the fines imposed by competition authorities taken into account when setting damages?

There have been no cases where damages have been awarded by the COMPAT to date.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The legal costs are to be borne by the litigants. However, a prayer can be made to the COMPAT for awarding of costs and the COMPAT, at its sole discretion, may award such costs at it deems fit.

33 Is liability imposed on a joint and several basis?

The Competition Act does not recognise the joint and several liability of cartel participants. Under the Competition Act, a claim for compensation requires the applicant to demonstrate the loss or damage suffered by it on account of an enterprise contravening Chapter II. The applicant must show 'privity' between its claim and the enterprise against which compensation is sought. Section 52N(3) of the Competition Act is clear that the COMPAT may direct an enterprise to compensate the applicant for the loss or damage caused to the applicant as 'a result of any contravention of the provisions of Chapter II having been committed by such enterprise'.

Usually the CCI does not impose joint liability in terms of penalties; instead it gives a complete breakdown of the individual liability of each actor based on their annual gross turnover.

34 Is there a possibility for contribution and indemnity among defendants?

There have been no cases where a possibility for contribution and indemnity among defendants has arisen.

35 Is the 'passing on' defence allowed?

There have been no cases where a passing on defence has been allowed.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The defences that a company may take as provided under the Competition Act are:

- efficiency defence (this defence works particularly towards excluding efficiency-enhancing joint ventures from the ambit of the prohibition of 'horizontal' anti-competitive agreements);
- intellectual property rights (with respect to agreements that may be alleged to have been in violation of the competition act);

- actions and acts committed prior to 20 May 2009 (ie, the date of notification of sections 3 and 4 of the Competition Act); and
- agreements relating to the production, supply, distribution or control of goods or the provision of services for export outside India.

37 Is alternative dispute resolution available?

Alternative dispute resolution is not provided for under the Competition Act. Neither the CCI nor the COMPAT have any statutory powers to direct parties to use alternative methods of dispute resolution.



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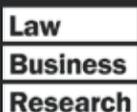
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