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SANCTIONS IN ANTITRUST CASES

Contribution by India

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Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

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SANCTIONS IN ANTITRUST CASES

-- India --

1. Introduction

1. A modern competition law regime was introduced in India by the enactment of the Competition Act, 2002 ('the Act'). The provisions of the Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009 and the provisions relating to regulation of combinations came into force from June 01, 2011. The Competition Commission of India ('the Commission' or 'CCI') has been established as an expert body to administer the Act. The Competition Appellate Tribunal ('COMPAT') has been established under the provisions of the Act to hear and dispose of appeals against the orders passed by the Commission.¹

2. The Act empowers the Commission to inquire into any alleged contravention of the provisions relating to anti-competitive agreements and abuse of dominant position either on its own motion or on receipt of information from any person or a reference made to it by the Central Government or a State Government or a statutory authority². Upon completion of investigation and hearing the parties, the Commission determines contravention, if any, by the concerned enterprise(s) or person(s) and passes punitive and remedial orders as considered necessary and appropriate within the framework of the Act.

2. Sanctions: Provisions in the Act

3. Under the current legal framework, sanctions are mainly civil in nature except in cases of non-compliance of orders of the Commission, where criminal sanctions follow. Under Section 27 of the Act, the Commission can pass various kinds of orders like imposition of penalty, cease and desist orders, order for modification of agreements, payment of costs, and any other orders/directions it deems fit.

4. India like in most of the advanced jurisdictions has a mechanism³ where the maximum limit of fine has been fixed by the legislature giving discretion to the Commission to suitably modify the same within the limits stipulated in the Act, after taking into account the facts and circumstances of a particular case.

¹ Section 53 A of the Act provides that the central government may by notification establish COMPAT for the purpose of hearing appeals against any direction issued or decision made or order passed by the Commission under subsections (2) and (6) of section 26 and sections 27, 31, 32, 33, 38, 39, 43, 43A, 44, 45 and 46 of the Act.

² Section 19 of the Act.

³ Section 27 (b) of the Act provides that penalty up to 10% of the average turnover of the last three financial years can be imposed "upon each of such person or enterprise which are parties to such agreement or abuse". Further, in cases of cartels, the penalty amounting to the higher of the following can be levied:

- i. three times the profit or each year of existence of the anticompetitive agreement; or
- ii. 10% of turnover, for each year of existence of the anticompetitive agreement.

The penalty can be levied on each producer, seller, distributor, trader or service provider included in the cartel.

5. Section 27 (b) of the Act provides that penalty up to 10% of the average turnover of the last (3) three financial years can be imposed upon each person or enterprise who are parties to an anti-competitive agreement or abuse of dominance. Cartels cases are dealt more sternly and hence higher penalties i.e. (3) three times the profit or 10% of turnover for each year of existence of the cartel, whichever is higher is envisaged. The penalty can be levied on each producer, seller, distributor, trader or service provider included in the cartel.

6. The Act does not envisage collective or joint dominance but provides for “group” dominance. If the Commission comes to a finding of contravention by an enterprise who is a member of a “group”, then other members, who have contributed to the contraventions or are responsible for the contravention, can also be penalized.

7. The Act contains deeming provisions of vicarious liability for individuals who are in charge of the conduct of the company or with whose consent or connivance, the contravention by the company takes place. After initial period of regulatory forbearance the Commission has started invoking this deeming provision against the individual of the infringing enterprise/association. Though, there are interpretational issues with regard to the procedure and sequencing in applying these provisions the law is likely to settle over a period of time after decisions by the Court on the subject.

8. The Act and the regulations do not explicitly deal with the power of the Commission to pass disqualification orders. However, Clauses (e) and (g) of Section 27 empowers the Commission to pass such other orders “as it deems fit”. In exercise of the powers conferred under these provisions, Commission has passed disqualification orders in two cases⁴. In the case of Crown Theatre⁵: The Commission directed certain individuals to disassociate from the affairs of the association including administration, management and governance in any manner for a period of (2) two years as the impugned anti-competitive conduct continued despite an on-going investigation by the Director General (DG)⁶ in another case. In the case of P. K. Krishnan⁷: The Commission imposed a ban on certain individuals, as they indulged in anti-

⁴ Case No. 16 of 2014 and Case No. 28of 2014.

⁵ Order dated 8th September 2015 in Case No. 16/2014 [In Re: Crown Theatre and Kerala Film Exhibitors Federation]. The primary allegation in this case was that the Kerala Film Exhibitors Federation (KFEF) was not allowing the Informant viz. Crown Theatre to screen Malayalam and Tamil language films in its theatre since May 2013. Consequent upon detailed investigation by Director General, such denial by KFEF was found to be in contravention of Section 3(1) read with Section 3(3)(b) of the Act. Apart from levying penalty on KFEF and its responsible office bearers, the Commission also directed the said individuals to disassociate from the affairs of the association including administration, management and governance in any manner for a period of two years. While imposing the ban on the individuals, the Commission noted that they pursued the impugned anti-competitive conduct despite the on-going investigation by the Director General in another Case no. 45 of 2012⁵ where also KFEF was alleged to have restricted competition by boycotting movies that were proposed to be exhibited in theatres owned by non-members of KFEF.

⁶ S 2(g) “Director General” means the Director General appointed under sub- section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section; for conducting investigation under the Act.

⁷ Order dated 1st December 2012 in Case No. 28/2014 [In Re: P. K. Krishnan and Paul Madavana and Others]. In this case, the Commission found All Kerala Chemists and Druggists Association (AKCDA) guilty of contravention of the provisions of Section 3 of the Act for imposing the mandatory requirement of obtaining no-objection certificate from it before the appointment of stockists by pharmaceutical companies. This case is the second instance where AKCDA and its office bearers were found to have indulged in no-objection certificate practice⁷. Therefore, apart from levying penalty on AKCDA and its responsible office bearers, the Commission also directed the said individuals to disassociate from the affairs of the association including administration, management and governance in any manner for a period of two years.

competitive conduct despite the earlier direction of the Commission to “cease and desist” from such practice and an undertaking given by them to that effect.

9. The Commission has thus used disqualification in exceptional circumstances of repeated contraventions. These remedies were imposed more as a preventive and remedial measure than a punitive one. However, both these orders of the Commission been set aside by the first appellate authority, the COMPAT, *inter alia*, on a technical grounds that the ban on individuals could not have been issued without a notice to them along with the need for the same⁸. The Commission has appealed against these orders of the COMPAT and the matter is pending before the Apex Court.

10. The Act does not envisage criminal liability for contravention of the provisions relating to anti-competitive agreement, abuse of dominant position and regulation of combinations. However, Section 42 of the Act provides for fines and/or criminal prosecution against persons who fail to comply with the direction or order of the Commission specified therein. Such a fine may extend to rupees one lakh (1500 USD) for each day of non-compliance to a maximum of rupees ten crore (1.5 million USD). Imprisonment for a term extending to (3) three years or fine extending to rupees twenty-five crore (3.75 million USD), or both, can also be imposed by the Chief Metropolitan Magistrate, Delhi on a complaint filed by the Commission. The Commission has initiated criminal prosecution in (15) fifteen cases and all are currently before the courts for finality.

11. CCI has the power to issue orders and directions on non-compliance⁹, penalties for contravention¹⁰ of its orders, false statement or omission¹¹ to furnish information, for offences in relation to furnishing of information¹². Further the Act also enables the Commission to pass directions on certain combinations¹³ and impose penalty for non-furnishing of information on combinations¹⁴.

12. The Act also provides for a leniency programme to support effective and efficient enforcement of the Act. Section 46 of the Act empowers the Commission to impose a lesser penalty on any member of cartel making full, true and vital disclosure to the Commission about the cartel provided that such disclosure is made before the receipt of the investigation report from the Director General (the investigation wing of the Commission). The Commission has framed the Competition Commission of India (Lesser Penalty) Regulations, 2009 which lays down the conditions and procedure for grant of leniency as well as the quantum of reduction in penalty that may be granted to the leniency applicants. Unlike many jurisdictions, leniency programme in India benefits not only the first-in applicant but subsequent applicants also. The benefit of reduction in penalty upto or equal to 100% is available to the applicant who first makes a vital disclosure enabling the Commission to form a *prima-facie* opinion regarding the existence of a cartel. The benefit of reduction in penalty upto or equal to 100% is available even if the matter(s) already under investigation. The second or third-in applicant are also be granted benefit of reduction in penalty of upto 50% and 30% respectively, but only on disclosure of evidence which will add value to the investigation by corroborating and completing the information on the cartel and

⁸ Order dated 10th May 2016 of COMPAT in Appeal No. 05/2016 [A.N. MohanaKurupvs Competition Commission of India and Others].

⁹ Section 42(3).

¹⁰ Section 42A, Section 43.

¹¹ Section 44.

¹² Section 45.

¹³ Section 30(2).

¹⁴ Section 43A.

its participants. The Commission has already received several applications under the leniency provisions. These are confidential and under consideration. Even though the efficacy of the leniency regime is yet to be tested and established, the Commission expects parties to make more and more use the leniency provisions in days to come.

13. The Commission does not have the power to award damages and compensation. This authority is vested in the COMPAT, by virtue of Section 53N of the Act. Compensation can be awarded to ‘any person’ who has suffered any loss or damage on account of contravention of the Act by the parties. Damages/compensation can also be awarded for contravention of the order of the Commission (Section 42A) or contravention of the order of the Tribunal (Section 53Q) by the enterprises. Section 53N (4)¹⁵ allows for filing of class actions claims, wherein one or more person may file an application after seeking permission from the Tribunal, on behalf of other persons having the same interest.

14. Although the *extant* legal architecture of competition law in India provides for awarding damages to private persons, effectiveness of these processes is yet to be tested. Only a few compensation applications have been filed before the COMPAT which have remained undecided in view of the pendency of the appeals before the Supreme Court. We expect that private action for damages, including the principles concerning *locus standi*, quantum of compensation, assessment of damage, *etc.* should gain momentum after determination of contravention reaches a finality in the Apex Court.

15. The Act gives power to the Commission to execute its orders concerning monetary penalties along with execution of other orders and directions under Section 42 of the Act. Section 39 of the Act empowers the Commission to recover penalty in accordance with the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011. The Commission can make a reference to the concerned income-tax authority for recovery of the penalty as tax due. The Commission has so far imposed penalty to the tune of rupees 14 thousand crores (2100 million USD) (approx.) in seven years of its existence. Considering that competition regime in India is still evolving and the legal procedures will take time to reach finality, only a small portion of the penalty has been recovered so far.

3. Arriving At Optimal Sanctions

16. The determination of optimum sanctions under competition law regime is guided by the objective of deterring the violating party as well as adequately dis-incentivising of individuals responsible for the anti-competitive activity from engaging in anticompetitive activity in future. A number of factors are taken into consideration by the Commission while arriving at the quantum of penalty for the contravention of the Act. These include deterrence, duration of the infringement, affected market, and effect on competition, principle of proportionality, ability to pay and recidivism etc.

17. Once the basic penalty is decided this is adjusted on the basis of aggravating and/or mitigating factors in a particular case. Aggravating factors which are normally taken into consideration while assessing the amount of financial penalty in antitrust cases, though not in order of priority, may include the following:

- Role of the enterprise as a leader in or as instigator of a cartel;
- Steps taken to coerce other enterprises to participate in the infringement;

¹⁵ The explanation to Section 53N discusses the manner in which such applications will be adjudicated, wherein the procedure will solely before the purpose of determining the eligibility and quantum of compensation, and will not be in the nature of fresh examination of the finding

- Repetition of the offence by the same enterprise;
- Refusal to cooperate with the Commission/Director General in carrying out investigation;
- Retaliatory/threatening measures taken by the enterprise against another entity;
- Infringements committed intentionally and not negligently;
- Production of false information/evidence by an enterprise to mislead the Commission/Director General;
- Continuation of infringement after initiation of investigation by the Commission;
- Involvement of director(s) and/or senior management;
- In case of individual liability level of involvement of the individual concerned and the decision making capacity of individual in the affairs of the association/enterprise;
- Importance of the sectors in which the infringement takes places, for the economy.

18. Mitigating factors which are taken into consideration while assessing the amount of financial penalty may similarly include:

- whether the enterprise is acting under threat or coercion;
- termination of the conduct by the enterprise on commencement of investigation by Commission
- involvement of the enterprise in the infringement for a limited period only or for a shorter duration in case of cartel;
- genuine doubt on the part of the enterprise as to whether the agreement or conduct constituted an infringement;
- infringement committed as a result of negligence rather than intentionally;
- presence of a sectoral regulator dealing with specific instances of anticompetitive activities;
- co-operation of the party with the Commission outside the scope of leniency programme and beyond its legal obligation to do so;
- anti-competitive conduct of enterprise perpetrated/ resulting from out of tender rules of public authority or legislation; and
- Adequate steps taken to ensure competition compliance programme/ schemes.

4. Decisional Practice

19. In the past seven years of the enforcement of the Act, there have been fifty seven (57) cases wherein penalties have been imposed for violation of Section 3 of the Act i.e. anti-competitive agreements. Major sectors in which infringement have been found are Pharma, Automobiles, Insurance, Cement and Media & Entertainment. Under Section 4, for abuse of dominance, the Commission has imposed sanctions

for violation in twelve (12) cases. Some of the major sectors in this segment are Real Estate, Stock Exchange, Media and Entertainment, *etc.*

20. The Commission while imposing penalties has been conscious to balance the conflicting need to deter and prevent anti-competitive conducts on one hand as well as killing of an enterprise and wiping off competition, on the other hand. Overall, Commission has been imposing penalties on the lessor side except in cases having special circumstances and, thus, requiring stringent action. To illustrate in the case of *Reference by B P Khare, Principal Chief Engineer, South Eastern Railway Against M/s Orissa Concrete and Allied Industries Ltd &Ors.*¹⁶, while contravention of the provisions of the Act was established, no penalty was levied by the Commission considering the ignorance of the parties and their small size.

21. *In re: Suo moto case against LPG Cylinder Manufacturers*¹⁷, concerning bid rigging by suppliers of 14.2 kilogram liquid petroleum gas cylinders, the Commission considered both mitigating factors like:the nascent stage of competition enforcement in India, the alleged contravention being the first instance, size of the enterprise as well as the aggravating factors like the cartel related to public procurement in an item of daily necessity for the public, namely cooking gas, prior to reaching a decision on the quantum of penalty. Commission imposed a penalty of rupees 168 crore (25 million USD (approx.).

22. Palpably, proportionality has been a guiding principle while imposing the penalties. The Commission holds the view that penalties must correspond to the harm done to the consumers, market and the economy. Though there are no specific methods, guidelines and tools to assess the harm done to the economy and the consumers, Commission gives due recognition to them on case to case basis. In recent cement cartelization case¹⁸, action of the cement manufacturing companies was not only found to be detrimental to the interest of the consumers but also to the economy as it prevented optimal utilization of capacity and thus achieving a lower cost of production and consequently reduced prices for the consumers. Moreover, cement is a critical input in construction and infrastructure industry and is vital for economic development of the country.

23. In the pharmaceutical sector Commission noticed chronic issues in the distribution segment in various States in the country, instigated by the provincial level chemists and druggists associations and perpetrated by pharmaceutical companies. Associations were found to be indulging in the anti-competitive practice of asking prior approval by the association before appointment of the stockists by pharmaceutical companies. Such practices restricted by the supply of goods or services in the market, thereby distorting the forces of fair play in a critical sector i.e. healthcare.

24. In the early period of the its enforcement, Commission imposed penalty only on the associations and was lenient towards pharmaceutical companies, as the latter were neither the members of the former nor were actively engaged in anti-competitive conduct. However, as more cases were filed, it came out that though the pharmaceutical companies were not members of these associations, they do succumb to anti-competitive practices, in acquiescence with these associations instead of acting as a whistle-blower and bringing their conduct to light. In view of this, Commission has imposed nominal penalties on them in subsequent cases.

¹⁶ Ref. Case No. 05 of 2011. Final order in the matter was passed in this matter on 21stFebruary 2013.

¹⁷ Suo Moto Case No. 03 of 2011. Final Order in the matter was passed in this matter on 6thAugust 2014 of the Commission.

¹⁸ Case No. 29 of 2010 In Re: Builders Association of India and Cement Manufacturers' Association and Others.

25. The Commission has also acted to remedying the obstinate behaviour of the chemists and druggists associations, some of whom, despite orders in the past, neither showed an inclination nor did desist from such behaviour. Hence, the Commission imposed maximum penalty envisaged under the Act i.e. 10% of their average income.

26. In Real Estate sector, penalty of 7% of the turnover was imposed on a leading real estate developer¹⁹ for abuse of dominant position as it was in respect of the basic necessity of housing and against vulnerable consumers, who have little ability or no ability to fight against such an abuse. The consistent practice of enforcing unfair conditions, holding out false promises, size and resources of enterprise and the duration during which the abuse continued to the advantage of builder as well as disadvantage of consumers, were taken as the aggravating factors.

27. The law in India is neutral and the Commission has imposed penalties on public sector insurance companies for cartelization and bid rigging. It also imposed a penalty on the single state owned company enjoying a natural monopoly in coal mining sector for abusing its dominant position. A penalty has also been imposed on the state run entity, Indian Trade Promotion Organisation (ITPO), for abusing its dominant position in the market of "Provision of venue for international and national trade fairs and exhibitions in Delhi". The Commission has proceeded against trade organisations and associations for providing a platform to its respective members for cartelization and anti-competitive conduct.

28. The COMPAT has also through its orders in appeal clarified and laid down principles for imposing optimal sanctions. In one of its orders, COMPAT has observed that the Commission is duty bound to consider all relevant factors such as the nature of industry, the age of industry, the nature of goods, the availability of competitors in the market, financial health of the industry etc., as well as take note of the law laid down by the Supreme Court, High Courts and the COMPAT.²⁰ In a case of bid rigging, COMPAT held the nascent stage of competition jurisdiction in India and absence of evidence of cartelisation or bid-rigging in the past as the mitigation factors that needs to be taken into consideration²¹.

29. Quantification of penalties is, thus an evolving area where concrete jurisprudence will emerge after certain substantive issues are settled. The Commission modulates the amount of penalty after weighing the aggravating and mitigating factors.

5. The way forward

30. Seven years of antitrust enforcement by the Commission and over five hundred and nineteen (519) numbers of final orders have made stakeholders aware of the provisions of the Act and the consequences of any form of anti-competitive behaviour. In addition to penalties the Commission has passed strict cease and desist orders on many association and class of stakeholders under various sections. As a result apart from the complaints alleging infringement of the Act, complaints alleging non-compliance of the orders of the Commission by enterprises and trade associations in certain sectors, have been filed. Thus, along with imposing penalties for anti competitive conduct, Commission is also intervening to ensure effective compliance of its orders.

¹⁹ Belaire Owners' Association Vs. DLF Limited, HUDA &Ors. (Case No. 19/2010)

²⁰ Order dated 1st July 2016 of the COMPAT in Appeal No. 36 of 2014 [International Trade Promotion Organization vs. Competition Commission of India].

²¹ Order dated 25th February 2013 of the COMPAT in Appeal No.93 of 2012 [MDD Medical Systems India Pvt. Ltd. v. Competition Commission of India &Ors].

31. Commission will continue to maintain its momentum in making markets competitive through its advocacy and enforcement measures. The Commission has through a mix of advocacy and enforcement measures, been able to make an impact in some of the sectors. While dealing with the grievances of consumers in real estate sector, Commission noted that the sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. This sector has grown significantly in recent years, but it has remained largely unregulated marked by absence of lack of adequate consumer protection. Thus, CCI, through its rulings in this sector, highlighted the need for an immediate and urgent law providing for sectoral regulator which will supplement the existing regulatory architecture in addressing the grievances of the purchasers through a mix of structural and behavioural remedies. It is gratifying that the Real Estate (Regulation and Development) Act 2016, has been passed. This was first proposed in 2009 and had remained moribund; it found resurgence through the sustained advocacy initiatives and constant prodding to the Government through rulings of the CCI.

32. Similar is the case in Port Regulation where Commission's intervention led to an amendment in relevant Scheme approved by the Apex Court, thereby, opening up of the market for all players. In pharmaceutical sector, the apex body of chemists and druggists has issued comprehensive guidelines for amendment to the bylaws and for non indulgence in anti-competitive practices pursuant to intervention by the Commission

33. The settling of jurisprudence by higher courts on some of key issues will further provide impetus to the efforts of Commission and pave the way for enabling CCI to frame Penalty Guidelines.

6. Conclusion

34. Any effective competition authority has to strike a balance between punitive and appropriate sanctions in antitrust cases. While there can't be soft pedalling in cases where anti-competitive behaviour is established, due consideration need to be given to aggravating and mitigating factors while arriving at the quantum of penalty. The Commission's constant endeavour is to ensure fair competition for greater good. To achieve this, Commission is trying to evolve a culture of compliance through continuous engagement with all the stakeholders. While efforts towards compliance will continue, Commission recognizes that well reasoned speaking orders on sanctions are no less an important tool for advocacy as they work as a deterrent and bring home the message of compliance effectively.