

# Private Damages and Class Action in India



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India stands at the threshold of new opportunities. Opportunities that can offer tremendous economic growth, if and only if those opportunities are utilized in a manner not prejudicial to anybody's detriment.<sup>3</sup> Infringement of competition law affects public interest as it has direct repercussions on both structural and proper functioning of market economy and consequently on economic activity of all operators and participants in it.

Anti-competitive conduct is detrimental to the economy. It causes losses to competitors whose business opportunities are curtailed or who are driven out of the market, to suppliers who receive too little and to customers who pay too much. Competition law as a matter of public policy does not generally deal with providing compensation to private parties adversely affected by an infringement but with the investigation and punishment of infringements so as to deter such behavior in the future. While public enforcement of competition law may be appropriate for bringing anti-competitive behavior to an end, however, it does not help the victims.

## I. RELEVANT LEGISLATION

The Competition Act 2002 (Act) is the relevant legislation governing antitrust actions and litigation. The authority to adjudicate claim for compensation is the Competition Appellate Tribunal (COMPAT). However the foundation on which the adjudication has to be done arises from the findings of the Commission or the order of the COMPAT itself.<sup>4</sup> Additionally, compensation applications under sections 53N, 42A or 53Q(2) are subject to the Competition Appellate Tribunal (Procedure) Regulations, 2011 and the Competition

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<sup>3</sup> The basic premise of the National Competition Policy is to unlock full growth potential of Indian economy, which among other things could also help in tapping the opportunities arising from the demographic dividend of our country. ([National Competition Policy: Para 4.2](#))

<sup>4</sup> Section 53N(1)





Appellate Tribunal (Form and Fee for filing an Appeal and Fee for filing Compensation Application) Rules, 2009.

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 Competition Commission of India (“CCI”).

## II. HISTORICAL BACKGROUND

Private rights of actions have been part of the Competition Act since the beginning. The inception of recovery of compensation for any loss or damage can be traced to the older legislation called the Monopolies and Restrictive Trade Practices Act back in 1969, which after the commencement of the Competition Act 2002 stood repealed. However, the authority to adjudicate and award such compensation went under a change after an amendment, before which the authority used to be the CCI. The earlier section 34 read with 27(c) & 28 (d), now repealed, gave the mandate to the CCI, which after the amendment, was given to the COMPAT under section 53N read with 42A & 53Q of the Act.

## III. DEVELOPMENTS IN ENFORCEMENT

While there are rules framed by the COMPAT for filing the compensation application, practically there is no guidance for a person or an enterprise who have suffered a loss from anti-competitive conduct of a competitor. This is also due to the fact in the first three years, the majority of cases were being decided at the CCI level, another two-three years at the COMPAT level, only after succeeding at both the levels, a party could file a claim for compensation.

So far there have only been two applications for compensation at the COMPAT. One is against a builder who was found to be abusing its dominant position in the relevant market. The applicant in this case is a person,<sup>5</sup> while according to some estimates, there were dozens of people who had got affected by the abusive conduct, however, none of them have come so far except one. This estimate is on the basis that the informant before the CCI was a resident welfare association comprising of people from around 600 apartments in one case. There were three such welfare associations who were informants in three separate cases against the same builder, along with some independent informants.

The other is against a stock exchange that was found to be abusing its dominant position in the market for services offered by stock exchanges. The informant in this case was a competitor who had the license to operate only in one service of the entire stock exchange services, and was brutally harmed by the zero (predatory) pricing of that service by the dominant stock exchange.<sup>6</sup>

## IV. CHALLENGES

The outcome of these two compensation application will form the basis of jurisprudence in this aspect in time to come. However, even by moderate standards, it would take years before they are taken for adjudication. This is because both cases are now in appeal from the Order of the COMPAT before the Supreme Court of

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<sup>5</sup> *Amit Jain v. DLF Limited* | CA No. 01/2015 in Appeal No. 20/2011

<sup>6</sup> *Metropolitan Stock Exchange of India Limited v. National Stock Exchange of India Limited* | CA No. 01/2014 in Appeal No. 15/2011





India, the highest court of the country, which may take time to decide given the huge number of pending cases.

In spite of all this, the real challenges are still to come in the forefront. These challenges will actually test the level of proof, economic models, and social cost of enforcement. We list down some real challenges:

1. **Access to evidence** — One of the key issues that an applicant may have to tackle is the access to evidence. Private claimants can only seek monetary relief to the extent that they can demonstrate the compensation owed to them from any findings of the CCI or the orders of the COMPAT.

The term “compensation” is not defined under the Act. However, as per section 53N (3) of the Act, COMPAT can be approached for compensation for any loss or damage shown to have been suffered by the applicant before COMPAT as a result of any contravention of the provisions of chapter II of the Act by the enterprise from whom compensation is being claimed. In these circumstances, it is probable that the term “compensation” will be interpreted in its most general sense, meaning “something meant to make good any loss or damage shown to have been suffered by the applicant.” The word “shown” clearly implies that the applicant seeking compensation will have the responsibility of proving its claim with documentary or oral evidence, or both.

Looking at the judicial precedents, the word “Compensation” has been interpreted in more ways than one:

(a) The word compensation is of very wide connotation. It may constitute actual loss or expected loss and may extend to compensation for physical, mental or even emotional suffering, insult or injury or loss.<sup>7</sup>

(b) In its dictionary meaning, “compensation” means anything given to make things equal in value; anything given as an equivalent, to make amends for loss or damage<sup>8</sup>; therefore, it does not necessarily need to be in terms of money.<sup>9</sup>

“Damages” on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term “compensation” etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.

Justice requires that it should be equal in value, although not alike in kind.<sup>10</sup> Therefore, a major question that arises is the calculation of damages.

2. **Calculating damages** — The second block of difficulty is to prove damages. In the United States, there is a concept of treble damages for competition violations except for joint ventures. They are mandatory and they are applied by a jury. So if the jury finds a person liable then automatically the judge has to treble the damages. There is no discretion whatsoever. And in addition to that there is a possible accumulation of state action and federal action. A person/enterprise cannot only face treble damages but sextuple damages and theoretically even more, although in practice it does not really happen.

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<sup>7</sup> *Ghaziabad Development Authority v. Balbir Singh* | (2004) 5 SCC 65

<sup>8</sup> *RC Cooper v. Union of India* | (1970) 1 SCC 248

<sup>9</sup> *State of Gujarat v. Shantilal Mangaldas* | (1969) 1 SCC 509

<sup>10</sup> *KSRTC v. Mahadeva Shetty* (2003) 7 SCC 197. The Supreme Court has also held that a misplaced sympathy, generosity and benevolence cannot be the guiding factor for determining the compensation. The object of providing compensation is to place the claimant(s), to the extent possible, in almost the same financial position, as they were in before the accident and not to make a fortune out of misfortune that has befallen them. (*Syed Bashir Ahmed v. Mohammed Jameel & Ors* (2009) 2 SCC 225)





In Europe, the Directive on certain rules governing action for damages, gives the option of a limited multiplier of damages for cartels and only doubling, which means that there is no concept of punitive damages. In India, the Supreme Court has had a chance to interpret the meaning of damages as below:<sup>11</sup>

The expression “damages” is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrong-doing of another (b) reparation awarded to the injured through legal remedies and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law [...] “

In this respect, our law is more inclined towards the EU directive, but, 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.

The Indian Evidence Act, 1872 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.

It must be highlighted that under the European Union Directive the only type of evidence under the Directive that enjoys unequivocal protection from disclosure concerns certain categories of documents produced in the context of competition law proceedings, such as leniency and settlement statements. Such protection while granted by CCI in the legislation and by COMPAT through an application for claiming confidentiality, it will be interesting to see how this confidential information is treated for calculating damages.

Unlike the European Union, where the Commission’s directive on damages action under Competition Law has two priorities, first being to enhance the effectiveness and efficiency of the overall enforcement scheme, second, to assess the social cost of private enforcement and balance those against increased efficiency, the CCI has not come out with any such paper, nor does it seem that it would be coming anytime soon. This is mainly because of two factors. First, the CCI is not the authority anymore to adjudicate a claim for compensation.<sup>12</sup> Second, the authority to adjudicate on claim for compensation is COMPAT, and therefore the CCI’s role is limited. However, a proviso under section 53(N)(3) of the Competition Act mandates, that the COMPAT may have to obtain the recommendations of the CCI before passing an order of compensation.

<sup>11</sup> *Organo Chemical Industries v. Union of India* (1979) 4 SCC 573

<sup>12</sup> This authority was taken from CCI by way of repeal of section 34 by the Competition (Amendment) Act 2007.





On the other hand, it is not certain whether the COMPAT is bound to follow the CCI's recommendation or not.

It must be highlighted that the COMPAT lacks the support of any economist or accountant or even a professional for that matter to assist it in these matters. Therefore, the role of the CCI becomes not only important but crucial as well.

3. **Class action** — The next challenge that is important particularly from a political point of view is from final consumers who have too small claims to bring individual lawsuits. While a 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. In such cases, the provisions of Rule 8, Order 1 of the Code of Civil Procedure, 1908 shall apply. Unlike the United States, or the European Union, where a product is sold on a bill, and that bill can act as an evidence of overcharge, we foresee a difficulty in finding people who first would have kept a receipt with them after all these years. However, a bigger question is about products that are sold without a bill, like cement, where sometimes a person orders ten packets of ten kg. each of cement through a contractor who is handling the construction. The logistics of identifying and representing such large number of people living in various cities, districts and states also poses a challenge.

Therefore, the substantive law is silent in respect of indirect purchases. Given the lack of jurisprudence, it is not known whether the COMPAT or the Supreme Court will accept the passing-on defence under the Indian competition law. However, there is no provision in the Act that prevents an indirect purchaser from bringing a damage claim.

## V. CONCLUSION

High amount of fines can seem to act as a deterrent but in reality they might not. The CCI lacks the mechanism to keep a check and at the most can only assume that a higher amount of fine will act as a deterrent for the enterprise in the future. In any case, fines do not compensate the losses caused.<sup>13</sup>

While, it is the duty of the Commission enshrined under the preamble<sup>14</sup> as well as under section 18<sup>15</sup> to eliminate practices having adverse effect on competition, promote and sustain competition, protect interests of consumers and ensure freedom of trade, the Commission has been finding it real difficult to discharge its function properly owing to multitude of reasons. These reasons range from working on less than mandated capacity of staff both at its own office as well as Director General (DG), extensive time taken for investigation and thereafter extended time taken to analyze the investigation report submitted by DG, cases getting remanded back from the Competition Appellate Tribunal, penalties getting reversed on procedural grounds, so on and so forth.

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<sup>13</sup> Fines are deposited to the Consolidated Fund of India. Section 47: Crediting sums realised by way of penalties to Consolidated Fund of India - All sums realized by way of penalties under this Act shall be credited to the Consolidated Fund of India.

<sup>14</sup> The Preamble reads as, "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

<sup>15</sup> Section 18: Duties of the Commission - Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.





In short, while the Commission attempts to deliver sound decisions, most of the times, it find itself defending its order at COMPAT or various high courts. Therefore, the Commission falls short to deliver what is expected out of it, even though it may not be for its own fault. This has a huge impact on the determination of an anti-competitive liability, and for reasons above, the consumer's interest is not as protected as it should have been. Hence the consumer/applicant fails to get any benefit from either the law or the policy.

