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Awards for Compensation in Antitrust: The Road Less Travelled in India

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The Competition Act, 2002 ("Competition Act"), which codifies Indian competition law, has now been enforced for over a decade (since May 2009). While we are witnessing the progressive evolution of Indian competition law, consumer claims for compensation for damages for anticompetitive conduct remains uncharted territory. There have been no judgments to date on any compensation claims by the National Company Law Appellate Tribunal ("NCLAT").

A claim for compensation depends on the Competition Commission of India ("CCI") finding a contravention of the Competition Act. With many cases soon reaching their conclusion before the Supreme Court of India ("Supreme Court"), India is soon also likely to witness a wave of damages litigation.

This article highlights various issues raised by claims for compensation, from the point of view of each stakeholder.

Who can file?

The Competition Act allows any government department, enterprise or person ("claimants") to apply to the NCLAT for compensation for any loss or damages suffered as a result of any contravention of the Competition Act by an enterprise.[2] There is no limit on who can claim, and claimants could include government departments, institutional buyers, distributors, final consumers or anyone who can show that any loss or damage has occurred due to the contravention.

While practical difficulties may arise in cases of individual final consumers, such as lack of documentary evidence and/or high litigation costs, class action or representative suits may help such individuals overcome these hurdles.[3] Therefore, both direct and indirect buyers can file for damages provided they demonstrate that damages or losses have been suffered. Showing that losses were suffered could be a difficult task for indirect consumers, since sometimes it is argued that the overcharge/loss due to anticompetitive conduct is absorbed along the distribution chain, resulting in no loss by the final buyer, commonly referred as the "passing-on" defense.

In this context, a conundrum which arises is the method of dealing with the passing-on defense and claims by indirect purchasers. A passing-on defense claims that the loss arising from the higher priced product was passed on by the direct purchaser(s) to its customers. Therefore, no loss was incurred by the direct purchaser(s). If the passing-on defense is accepted, then the claimants would be limited to indirect purchasers. Given that most indirect purchasers include individual consumers having limited resources and limited access to documentary proof of the loss incurred, acceptance of the passing-on defense may undermine the effectiveness of claimants' rights to claim for damages.[4] On the other hand, rejecting the passing-on defense raises risk of overcompensating direct purchasers who pass on their losses to indirect purchasers. A natural corollary of rejecting the passing-on defense is the rejection of claims raised by indirect purchasers.

In the U.S., the Supreme Court rejected the passing-on defense in *Hanover Shoe Inc v United Shoe Machinery Corp*[5], and observed that defendants cannot avoid liability on the ground that the losses have been passed on by direct purchasers. In fact, it was held that direct

purchasers are in most circumstances entitled to receive the amount of overcharge in full, even if they have passed on the loss to indirect purchasers. In *Illinois Brick Co v Illinois*[6], claims by indirect purchasers were rejected on the ground that indirect purchasers have no *locus standi* to claim damages, showing that the passing-on defense is not available under U.S. law. In the EU, the Damages Directive states that any person who has suffered any loss, irrespective of whether they are direct or indirect purchasers can claim for damages .[7] Further, it allows for a passing-on defense to be raised by defendants, who bear the burden of proof of showing that such passing-on occurred.[8]

In India, subsection (3) of Section 53N of the Competition Act states that it is for the Appellate Tribunal to determine the amount realisable from an enterprise as compensation for any loss or damage caused to the applicant. Therefore, this includes the possibility of invoking a passing-on defense, since the loss incurred due to the contravention is the basis for determining the quantum of compensation. As such, in pending cases before the NCLAT, such as *Food Corporation of India v. Excel Crop Care Limited and Others,*[9] it will be interesting to see how a "passing-on" defense, if raised, would be treated by the NCLAT. In this case, the Supreme Court, on May 7, 2017 upheld the findings of the CCI, made in 2012, that three agrochemical companies had rigged their bids in certain tenders by the Food Corporation of India. In July 2019, two years after the Supreme Court judgment, the Food Corporation of India ("FCI") filed an application to the NCLAT, claiming compensation from the three agrochemical companies.

Is there a need to prove the existence of a contravention?

The law clarifies that a claim for compensation can only be made to the appellate tribunal once the CCI finds a contravention. Further, there is no burden to prove afresh that the contravention has taken place. However, the burden of proof will be on the claimant to show that loss or damages were suffered. In practice, it has been observed that while the appellate tribunal may admit such cases, it may not hear such applications where the parties have filed appeals (i) challenging the order of the CCI before the appellate tribunal itself or (ii) against the order of the appellate tribunal before the Supreme Court, until a final decision has been rendered. Evidently, appeals in cases such as *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd,* where the CCI and the appellate tribunal found the existence of an abuse of a dominant position, remain pending, as the matter is *sub judice* before the Supreme Court for final adjudication.[10]

When can you file a claim for damages?

Another issue which could arise in such cases is the stage at which the claim for damages should be filed, i.e. whether the claimant should file for damages just after the order of the CCI/NCLAT or await the final decision by the Supreme Court. Section 53N of the Competition Act, as it stands today, provides that the claim may be filed after the decision of the CCI or the NCLAT and there is no specific provision requiring applications to be filed after the conclusion of Supreme Court proceedings.[11] Owing to this, in many cases, compensation applications are filed just after the decision of NCLAT, even while the main appeal is pending before the Supreme Court. Cases such as *MCX Stock Exchange Ltd. v. National Stock Exchange of India*

Ltd., where the compensation application was filed after the order of the NCLAT but before the final decision of the Supreme Court, remain pending and are not actively heard by the NCLAT.

This situation would be covered by the provisions of the proposed Competition (Amendment) Bill, 2020 which broadens the stage at which compensation application can be filed. Section 53N (1) is proposed to be amended to clarify that applications can be filed after the findings of the Supreme Court (which is not addressed in the unamended provision). Accordingly, if the amendment is enacted, the parties would have an option to file for compensation after the findings of the Supreme Court without undergoing the risk of defenses claiming that the application ought to have been filed right after the decision of the NCLAT.

Further, the Competition Act does not prescribe any limitation period within which a claim for compensation can be filed. Having a limitation period has its own advantages, and indiscriminate use of the absence of a limitation clause could lead to filing of stale claims where there is little chance of producing evidence of dated damages. While the Indian Limitation Act 1963 ("Limitation Act") does not apply to the CCI's procedures, guidance may be drawn from it. Generally, suits should be filed within a "reasonable period," which is determined based on factual considerations in each case.[12]

While currently there are no precedents, it is possible to contemplate situations where defendants would argue that the CCI adopt a reasonable limitation period in using its statutory powers to devise its own procedure.

How does one file representative applications?

The Competition Act allows filing of representative applications (similar to "class actions") where damages are suffered by numerous persons having the same interest.[13] One or more such persons, need the permission of NCLAT before proceeding with a joint application, which is akin to a representative suit in terms of Rule 8 of Order 1 of the First schedule of the Civil Procedure Code, 1908. An essential condition for such an action is commonality of interest among the parties being represented. Under Rule 8, the decision taken is binding upon all the parties being represented in the suit. However, parties who not represented in the suit are not bound by the decision and can pursue their interests separately.[14]

In the U.S., an essential element of a class action suit is the Court's certification of the class of persons being represented. However, the certification process in the U.S. has high thresholds and plaintiffs face difficulties in successfully obtaining such certification.[15] In the EU, the European Commission's Recommendation issued on June 11, 2013 ("EU Recommendation") focusses on the need for collective redress procedures to be fair, equitable, timely and not prohibitively expensive. The EU Recommendation provides that recommendations pertaining to class action suits should be considered by EU Member States to ease the process of representative actions.[16] There are no precedents on this in India, and commonality of interest seems to be the one important factor under sub-section (4) of Section 53N of the Competition Act.

Confidentiality

The Competition Act provides for the confidential treatment of information provided by the parties to a case. Section 57 of the Competition Act grants confidentiality against disclosure of information obtained by the CCI or the appellate tribunal, except where the information is required to be disclosed in compliance with the Competition Act or any other law in force. In practice, the CCI does not disclose confidential information, unless it is necessary for the case. Further, it is difficult for third parties to seek disclosure of information in such cases and there are hardly any practical examples where information was disclosed to third parties.

At the same time, claimants need to prove their claims i.e. the quantum of loss and the causal link with the contravention. This requires information that is usually available to the CCI or the Director General ("DG"). In cases where confidentiality has been granted by the CCI, it may be difficult for claimants to seek information directly from the CCI and the appropriate course could be an application to the NCLAT to call for the records of the CCI in order to support their claims for compensation made before the NCLAT.

In such situations, it would be incumbent upon the NCLAT and the CCI to consider what information can be disclosed to the parties. This may raise concerns of balancing the interest of the party providing the information *vis-à-vis* the interest of claimants requiring disclosure to support their claims. The balance becomes finer where there is a leniency applicant who has cooperated with the CCI under the leniency regime while providing the information. Such cases require a balancing of public interest at large as the viability of the leniency regime is put to test.

Many leniency cases have been decided by the CCI, and it is possible that the NCLAT may receive applications seeking damages. In such cases, information must not be disclosed in a manner that would undermine the incentives of industry players to file for leniency. At the same time, the effectiveness of private damages claims is recognised as essential to the effective enforcement of competition rules in most jurisdictions.[17] The development of compensation jurisprudence in India may also have a direct impact on the leniency regime considering that applicants will have to weigh the benefits of disclosure of conduct and the possible awards claims that may arise as a result of admitting contravention of the law. This is a trend which has been witnessed in the EU.

In the EU, the criteria for disclosure depend on whether the information sought is (i) relevant (relates to the subject-matter of dispute), (ii) reasonably justifiable (harm has been caused to the claimant by the defendant's conduct) and (iii) proportional (evaluating the interests of all parties).[18] The Court of Justice has held the victim's right of compensation to be paramount.[19] In the UK, the *Truck Cartel Case* ordered disclosure of the "less redacted version" of the order since it would help Royal Mail elaborate its claim.[20]

On the other hand, American Courts give paramount importance to non-disclosure since they do not wish to undermine their leniency program which is deemed to hold a higher public interest value.[21] Evidently, while more mature jurisdictions have varying stances on this issue, the CCI and the NCLAT will have to balance the need of both stakeholders. Extensive disclosures could facilitate claimants for private damages, which could increase the overall cost of participation in a leniency regime by parties.

Damage calculation

In order to seek damages, the applicant must demonstrate that the loss suffered resulted from any contravention of the Competition Act by an enterprise. Calculation of the damages remain a tough procedure in such cases. The European Commission[22] aims to restore the full value of any loss suffered and also envisages recovering compensation for loss of profit plus interest from the time damages were incurred. [23] In India, the common law on calculation of damages aims to restore the person to the same position it would be in had the contravention not occurred.

Conclusion

The Indian law pertaining to private compensation is broad enough to include claims from anyone who can prove loss incurred due to anticompetitive conduct. However, the method used to calculate losses is one of the toughest issues in claims for compensation. With no guidance on the issue, claimants are likely to apply the contractual/common law on damages for calculation of losses and take further cues from international best practices. With the increase in leniency applications, the issue of disclosure of confidential information must be carefully balanced. The approach adopted must not deter industry players from disclosing their conduct, while protecting the rights of claimants to seek damages, to ensure effective implementation of the competition rules.

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[2] See Section 53N of the Competition Act.

[3] See sub-section (4) of Section 53N of the Competition Act which allows for representative applications to be filed.

[4] Richard Whish and David Bailey, Competition Law, 8th Edition, page 317.

[5] 392 US 481 (1968).

[6] 431 US 720 (1977).

[7] EU Damages Directive, Article 12

[8] EU Damages Directive, Article 12, Article 13.

[9] Compensation Application (AT) No. 1 of 2019 in Competition Appeal (AT) No. 79-81 of 2012.

[10] *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd*., 2011 SCC Online CCI 52.

[11] See subsection (1) Section 53N .

[12] *State of Jharkhand v. Shivam Coke Industries*, (2011) 8 SCC 656.

[13] See subsection (4) of Section 53N of the Competition Act.

[14] MP Jain, The Code of Civil Procedure, 5th edition 2019 from *Ahmad Adam v ME Makhri*, AIR 1964 SC 107.

[15] Got Class?: A Comparison of US and EU Collective Actions, American Bar Association Section of International Law, 2016 European Forum, May 30, 2016, Rome, Italy.

[16] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law; Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H0396&from=EN%20.

[17] *Courage Ltd v Crehan*, Case C -453/99 [2001] ECR I-6297, paragraphs 26-27.

[18] Damages Directive lays down the criteria; Available at: https://europa-kolleg-hamburg.de/wp-content/uploads/2018/03/SP-01-18.pdf (pg. 27-28).

[19] *Bundeswettbewerbsbehorde v Donau Chemie AG*; Case C–536/11; The Court noted – "*only if there is a risk that a given document may actually undermine the public interest…that nondisclosure of that document may be justified*."

[20] "English judge agrees to DG Comp truck disclosure", GCR, 8 December 2017 – https://globalcompetitionreview.com/article/1151584/english-judgeagrees-to-dg-comp-trucks-disclosure .

[21] *In re Micron Technology Inc. Securities Litigation*, Case No. 09-mc-00609 (Doc. No. 17) (D.D.C. Feb. 01, 2010); *United States v. Smith, 985 F. Supp. 2d 506, 522-23 (S.D.N.Y. 2013); US v Betancourt* No. 19-6038 (10th Cir. 2019) (reaffirming *U.S. v Smith*).

[22] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union OJ [2013] C 167/19.

[23] *Ibid* at para 6.