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## **Private Enforcement of Competition Law Issues**

### **Competition Commission of India vis-à-vis Alternate Forums - Is it actually an option?**

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#### **Abstract**

In the recent times, competition law claims have been on a rise, but are all parties adequately compensated or just the illegal activity/practice is being curbed. The need of the hour is not restricted to creating awareness by punishing the entities involved in anti-competitive activity or abusing their dominant position in the market but to make good the losses to the injured party. This leads to the requirement of private enforcement of competition law claims but to what extent is it necessary needs to be tested.

This article will examine the scope of private enforcement of competition law issues and compare the same with as existing in US and EU jurisdictions.

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## **Private Enforcement of Competition Law Issues**

### **Competition Commission of India vis-à-vis Alternate Forums - Is it actually an option?**

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.<sup>1</sup> 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 behaviour in future.<sup>2</sup> The main objective of the law is to encourage healthy competition in trade and business and help stop unscrupulous business activities that, in most cases, are aimed at cheating the consumers and controlling markets through means -- fair or foul.<sup>3</sup> However, with the rise in anti-competitive agreements and exclusive arrangements entered between parties, the need to protect the private rights of the parties assumes significance in today's times.

The primary means of enforcing competition law is done exclusively through competition law authorities established in various jurisdictions. Private enforcement of competition law issues is an established, well-developed and vibrant mode of enforcement in United States constituting the preponderance of Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”).<sup>4</sup> Whereas in United Kingdom and European Union, traditionally though competition law enforcement was within the exclusive domain of administrative authorities, the European Commission and Office of Fair Trading, with the passage of Competition Act, 1998 and Enterprise Act, 2002, private enforcement of competition law disputes has been encouraged.<sup>5</sup> In

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<sup>1</sup> Why competition matters, A Guide for Policy matters, Office of Fair Trading, available at [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/OFT1113.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/OFT1113.pdf), last visited on January 13, 2013.

<sup>2</sup> Arbitrating Competition Law Disputes: a matter of Policy, Francesca Richmond & Sarah West, Baker & McKenzie, available at <http://kluwerarbitrationblog.com/blog/2012/02/09/arbitrating-competition-law-disputes-a-matter-of-policy/>, last visited on January 14, 2013.

<sup>3</sup> Competition Law to relieve consumers of unhealthy business practice, Shafique, available at [http://www.thefinancialexpress-bd.com/more.php?news\\_id=135247&date=2012-07-02](http://www.thefinancialexpress-bd.com/more.php?news_id=135247&date=2012-07-02), last visited on January 15, 2013.

<sup>4</sup> S Calkins, “Perspectives on Trade and Federal Anti-Trust Enforcement, (2003) 53 Duke L. J. 673, 699-700.

<sup>5</sup> Professor Barry Rodger, Competition Law-Litigation in the UK Courts-Cases 2005-2008, Part I, [2009] G.C.L.R

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the recent past, damages actions for antitrust infringements in Europe were on the increase: national courts were regularly asked to rule on claims in follow-on actions once the European Commission or national competition authority has issued an infringement decision.<sup>6</sup> Compensation for damages constitutes the greatest incentive and most useful instrument with respect to private enforcement of competition law.

In India, the Competition Act, 2002 (“Act”) based on the report of a High Level Committee on Competition Law and Policy set up by the Government was drafted to suit the needs of the ever changing economic scenario, adopting a global approach as well as to address the concerns of the competition law regime in India. The very intent of the Act is 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. In keeping with this intent, the Act set up the Competition Commission of India (“CCI”) vested with powers to monitor anti-competitive behaviour taking place within the country as well as outside having an impact on the Indian markets. Section 32 of the Act empowered the CCI to take cognizance of an act taking place outside India but having an adverse effect on competition within India. However, the development of competition law jurisprudence is still at its nascent stage in India. Although the CCI is well empowered under Section 32, till date there have been no regulations or rules introduced to govern the manner or the time frame within which the regulator is required to act in matters beyond Indian territorial limits.

Further the Act has an overriding effect with respect to other laws in force and is in addition to the provisions of any other law in force<sup>7</sup>. Thus, applying the principle of harmonious construction, where there is a direct conflict between the provisions of the Act and any other law, the former will prevail, and where there is no conflict, provisions of both laws will apply together. Additionally, the Act bars the jurisdiction of the civil courts to entertain any matters

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<sup>6</sup> The Current Climate in Anti-Trust Damages Action in the UK and Europe, Douglas Lahnberg, available at [www.orrick.com/\\_layouts/DownloadDocument.aspx?ID...1781](http://www.orrick.com/_layouts/DownloadDocument.aspx?ID...1781), last visited on January 15, 2013

<sup>7</sup> **Section 60. Act to have overriding effect.** - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**Section 62- Application of other laws not barred-** The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

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within the purview of the CCI or Appellate Tribunal or grant any injunction thereto.<sup>8</sup> The concept of private enforcement of competition law claims is limited in India to the extent providing damages to affected parties. The question arises whether existence of CCI curbing anti-competitive acts and protecting consumers, would prevent private parties from approaching the Courts and Arbitral Tribunals to seek reliefs.

This paper will focus on the other alternate options available to parties to resolve competition law disputes in India.

- **Arbitrating disputes vis-à-vis adjudicating before CCI**

Arbitration is a private way to settle disputes and usually adopted in cases involving commercial issues. Competition issues arise in arbitration only in relation to anti-competitive agreements or one party exerting its dominance over the other. The arbitrability of competition issues was subject of controversy since ages. Arbitration was always regarded as a means to resolve private disputes between parties thereby protecting the confidentiality of the issues involved, however competition law being based on issues of public policy, arbitrating such disputes may go against the very purpose. Further, due to lack of precedents, the Arbitrator may not be deemed to have the same authority as public enforcement of competition law through statutory authorities' along with rendering decisions that may conflict with that given by a competition authority.

### **European Union (“EU”) and United States**

The modernisation of EU competition procedure through the adoption of the Modernisation Regulation in 2004<sup>9</sup>, has laid the foundations for private enforcement of the EU competition law rules in Europe, thereby creating a favorable environment for EU competition arbitration.

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<sup>8</sup> **Section 61 Exclusion of jurisdiction of civil courts.**- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission is empowered by or under this Act to determine and no injunction shall be granted by a y court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

<sup>9</sup> Council Regulation No.1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.

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The European Court of Justice (“ECJ”) in *Eco Swiss*<sup>10</sup> implicitly acknowledged the principle of arbitrability of competition law aspects and held that arbitrators could apply EC competition law rules. However, it is essential to clarify that arbitrability of competition law, is only with respect to the ‘civil’ aspect of competition law<sup>11</sup>, in relation to the private law claims and not in relation to public sanction in the form of fines following a violation of competition law.<sup>12</sup> The same was adopted in *ET Plus SA v Welter*<sup>13</sup>, wherein claims alleging a breach of Articles 81 and 82 (Article 82 prohibits the abuse by an undertaking of a dominant position) are arbitrable if they fall within the scope of a contractual arbitration clause.

Whereas in the United States initially, in accordance with the *American Safety* doctrine, considering the importance of public interest and complexity involved in competition law issues, arbitration of competition law issues was considered inappropriate. The Courts in the cases of *Applied Digital Technology Inc. v. Continental Casualty Co.*<sup>14</sup> clearly held that claims arising out of antitrust issues are non arbitrable and thereafter in *Cobb v. Lewis*<sup>15</sup> upheld that “*antitrust issues non-arbitrable unless arbitration agreement negotiated after dispute arises*”. However, later in 1985, in the *Mitsubishi* judgment<sup>16</sup>, the Supreme Court held that as long as the prospective litigant can effectively vindicate its statutory cause of action in the arbitral forum, same shall be permitted. The same trend was continued by Courts in *GKG Caribe Inc. v. Nokia-Mobira, Inc.*<sup>17</sup> and *Gemco Latino-america, Inc. v. Seiko Time Corp.*<sup>18</sup> wherein the American Safety doctrine was rejected and arbitration of domestic antitrust issues was allowed. Further, at

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<sup>10</sup> *Eco Swiss v. Benetton* [1999] ECR I 03055

<sup>11</sup> S. Dempegiotis, ‘EC competition law and international arbitration in the light of EC Regulation 1/2003: Conceptual conflicts, Common grounds, and Corresponding legal issues’, (forthcoming June 2008), 25(3) *Journal of International Arbitration* as cited in Sotiris I. Dempegiotis, *EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, available at <http://www.icc.qmul.ac.uk/GAR/GAR2008/Dempegiotis.pdf>, last visited on January 15, 2013.

<sup>12</sup> J.D. Lew, L. Mistelis, and S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 485 as cited in Sotiris I. Dempegiotis, *EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, available at <http://www.icc.qmul.ac.uk/GAR/GAR2008/Dempegiotis.pdf>, last visited on January 15, 2013.

<sup>13</sup> [2005] EWHC 2115 (Comm)

<sup>14</sup> 576 F.2d 116 (7th Cir. 1978)

<sup>15</sup> 488 F.2d 41 (5th Cir. 1974)

<sup>16</sup> *Mitsubishi Motors Corp v. Soler Plymouth Inc.* 473 U.S. 614 (1985)

<sup>17</sup> 725 F.Supp. 109, 110-113 (D.P.R. 1989)

<sup>18</sup> 671 F.Supp. 972, 979 (S.D.N.Y. 1987)

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the award enforcement stage, if the interest of anti-trust issues is handled, arbitration is permissible in accordance with the “*Second Look*” doctrine. It was clarified that antitrust laws being extremely complex, at the time of enforcement of awards, the courts, at that stage, could check whether relevant competition laws had been addressed.

The Swiss Tribunal Fédéral has also confirmed the arbitrability of competition law issues, even though stopping short of imposing an obligation on the arbitrator to raise competition law issues *ex-officio*.<sup>19</sup> The usage of arbitration as means to resolve competition law issues is permissible only if the same is arbitrable and is limited to the extent of awarding damages to the affected party owing to violation of competition law rules.

The situation in India is very different from US and UK where flexibility is provided to use arbitral process. The Delhi HC in *Union of India v. CCI*<sup>20</sup> dealt with the issue of maintainability of proceedings before CCI, in case of existence of an arbitration agreement between the parties and held that scope of proceedings and focus of investigation and consideration before Commission is very different from the scope of an enquiry before an Arbitral Tribunal. In the present case, parties had entered into a Concession Agreement with the Ministry of Railways for operating container trains over rail network in India for domestic traffic as well as import and export traffic. The Respondent No. 2 complained before the CCI against Railway Board and Container Corporation of India for alleged violations of Section 4 of the Act, abusing its dominant position through increasing charges of services and imposing restrictions by not providing Respondent No. 2 access to infrastructure. The Ministry of Railways contended that due to existence of an arbitration agreement, proceedings before CCI were non-maintainable.

The CCI upon hearing the Respondent No. 2 was of the view that prima facie case existed and directed the Director-General (“**DG**”) to investigate, followed by issuance of Notice to Ministry

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<sup>19</sup> Tribunal Fédéral Suisse, 13 Nov 1998. [1999] ASA Bull 529 and 455, where the Court stated:

‘One cannot require the arbitrator to be aware of or systematically search for the mandatory rules of law (such as Art 85 EC for example) in each of the legislations showing signs of significant points of contact with the relationship in the dispute.’

<sup>20</sup> W.P. (C) 993 of 2012 & C.M. Nos. 2178-79 of 2012

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of Railways. The DG based on the above order issued Notice to the Petitioner. This led to the filing of writ petition by the Petitioner before Delhi HC challenging the issuance of Notice and raised jurisdictional issues. The Delhi HC correctly dismissed the petition and held all issues to be raised before the CCI itself as the scope of proceedings before CCI were entirely different from contractual obligations dealt before an Arbitral Tribunal and Act had overriding effect over all other laws. Further, an Arbitral Tribunal decides in light of contractual clauses and does not look into aspects of abuse of dominance. The Arbitral Tribunal does not have the mandate, neither the expertise, nor the ability to conduct an investigation necessary to decide issues of abuse of dominant position by one of the parties to the contract. In view of the above, disputes on abuse of dominance was held non arbitrable. However, it would be interesting to look at a situation where parallel proceedings are initiated before Arbitrator and the CCI dealing with separate issues within their respective domains so that all aspects of the dispute are dealt properly before respective forums without encroaching on each other's jurisdiction and rendering contradictory outcomes.

Disputes pertaining to performance of contracts may be litigated separately for awarding damages in addition to seeking compensation from Competition Appellate Tribunal (“COMPAT”) if declared void by virtue of being anti-competitive. In some ways this would also amount to private enforcement of competition claims.

- **Maintainability of writ petition in competition law issues**

Writ jurisdiction of Courts deal with violation of legal/constitutional/fundamental rights and not with administrative sanctions falling within the purview of a particular authority/quasi-judicial body vested with powers to address specific issues. The issue of maintainability of writ petition to address claims of parties affected by competition issues has also been analyzed by the judiciary clarifying that different forum addressing separate issues seeking different reliefs are not barred and do not lead to multiplicity of proceedings. Prior to enactment of the Act, the Supreme Court (“SC”) had held that the court would be justified in passing the order on alleged restrictive trade practice only when it is "*prejudicial to public interest*" under Clause (h) of

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Section 38(1) of the Monopolies and Restrictive Trade Practices Act, 1969 (“**MRTP Act**”). The pre-condition for passing such an order is that the restriction as imposed directly or indirectly when restricts or discourages competition to any "material degree" in any trade or industry, then only it would be considered as "prejudicial to public interest". The Court should not pass an order of "cease and desist" where the alleged restrictive trade practice does not have the impact on restricting competition to any material degree.<sup>21</sup>

The Delhi High Court (“**Delhi HC**”) in *Jindal Steel and Power Limited & Anr. v. Union of India*<sup>22</sup> dealt with the issue of maintainability of writ petition. In this case, a Memorandum of Understanding dated February 1, 2003 (“**MOU**”) was entered between Ministry of Railways and Steel Authority of India (“**SAIL**”). Jindal prior to approaching the CCI filed a writ petition in Delhi HC and thereafter challenged the MOU before the CCI as being anti-competitive and awarded to SAIL without following the auction process. The Ministry of Railways contended that Jindal sought to approach both forums with the intention of creating multiplicity of proceedings. Jindal submitted before the Delhi HC that the doctrine of election of remedies was not applicable as contended by SAIL, since only where the remedies in question are repugnant or inconsistent with each other would such claims lie and the writ petition only dealt with the aspect of legitimate expectation of Jindal to be considered for empanelment for supply of steel rail tracks and applicability of principle of promissory estoppel in view of the huge investments made by Jindal and violation of their fundamental rights and reliefs sought therein could not be granted by CCI in proceedings under the Act.

The Delhi HC held that separate remedies were provided by both forums – Court and the CCI and both were not repugnant or inconsistent with each other. Two separate causes of actions before separate authorities against different parties seeking different remedies were pursued, the information before the Hon'ble Commission does not overlap with the jurisdiction of the Hon'ble Delhi HC which is also seized with issues arising out of same set of facts and both actions may be pursued concurrently. The parties under writ jurisdiction can seek appropriate directions to

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<sup>21</sup> Raymond Woollen Mills Ltd. v. Director General (Investigation & Registration) & Anr. (2008)12 SCC 73

<sup>22</sup> [2012]107 CLA 453 (Delhi)

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strike down policy or direct procurement by competitive bidding process whereas CCI can impose penalties and direct MOU to be modified or discontinue arrangement. The Delhi HC clarified that access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

### **Conclusion**

There is not much jurisprudence developed in India with regard to alternative means available to resolve competition issues. Government enforcement is a solution but rarely helps the direct victims of illegal behaviour and thereby compelling them to resort to private enforcement. This leads to multiplicity of proceedings before several foras, thus being opposed vehemently by certain section of scholars and propagating only public enforcement of competition law issues, considering the nature of the disputes. There being hardly any jurisprudence on the arbitrability of competition law issues, it just leads to unanswered questions, whether arbitration can be used as another tool for enforcement of competition law. However, complete absence of private enforcement would prevent parties affected by competition related disputes from being restituted as fines imposed by statutory authorities for violation of provisions of the Act would not restore the affected party from the losses suffered by it. The public authorities need to understand that it would only play a minor accompanying role and should be permitted to provide reliefs to direct victims. With increasing number of anti-competitive agreements entered between parties and the extensive application of Section 3 of the Act, the need for alternate means to resolve competition law issues cannot be ignored and assumes greater importance in today's market scenario.