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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **Due Process And Transparency: A Jurisprudential Overview** **Of Indian Competition Law**

Authored By - Harsh Enaniya,  
Assistant Professor,

## **Abstract:**

The thrust of this paper is on discussing the proceedings of Competition Commission of India and the *Due Process* in extensive detail in order to trace its growth and contribution in the evolution of the Competition Law jurisprudence in India. The *Competition Act* commenced in 2002, and since then, the CCI (Competition Commission of India) has been doggedly engaged in using all available means, like, enforcement and advocacy, to spread awareness about the fundamentals of free market and the importance of adhering to the law by all the stake holders, like, the businesses, the bureaucracy, consumers and the legal fraternity.

The law is firmly entrenched in India, evident from the judicial review of various orders passed by the Commission in India, leading to the highlighting of some important legal points. According to the Section 36 of the Competition Act, 2002, the Competition Commission of India shall discharge its functions as per the principles of natural justice, and shall be empowered to establish its own regulation procedures, but these will be subject to the rules formulated by the Central Government as well as other provisions of the Act. It is evident that by directing the Commission under Section 36 to observe the principles of natural justice, prevention of miscarriage of justice has been ensured, even while it has been allowed freedom to develop its own regulation procedure for the discharge of its duties. Section 18 of the Act lays down that its duties involve 'eliminating or discarding practices that can adversely affect competition, safeguarding the interests of the consumers, and ensuring that all participants are free to carry out their trade, in the Indian market'.

However, there is controversy galore as to how far the principles of natural justice must be applied in the specific situations under the different sections of the Act. Nevertheless, the competition law in India has evolved sufficiently on this topic, as is visible from the orders and decisions of the



Commission as well as the directions laid down through the different orders of the Competition Appellate Tribunal (COMPAT), High Courts and the Supreme Court.

**Keywords:** *Competition Law, Competition Commission of India, Principle of Natural Justice, Due Process.*

## INTRODUCTION

*“Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute.”*

*-Supreme Court of India in Competition Commission of India vs. SAIL & Anr.<sup>1</sup>*

Procedural rationality and transparency is the key to effectively enforce every legal statute, wherein the institution has the power to establish the rights and liabilities of the parties covered in the statute. Legal procedures implemented effectively not just help in fulfilling the purpose of the legislation, but also prevent wastage of judicial resources and time that would otherwise be committed during protracted litigation processes. In the Indian context, the ideas of due process and procedural equity have evolved as the outcome of the legal precedents and interpretations made by the Supreme Court of India of the term “procedure established by law” under Article 21 of the Constitution of India.

The Competition Commission of India (“CCI”) came into existence with the enactment of the Competition Act, 2002 (“Competition Act”), with the purpose of safeguarding the interests of the consumers and protecting competition in the Indian markets. The CCI can fulfill these objectives through functions that are advisory, adjudicatory, investigative and regulatory, for which they are authorized to formulate a regulatory mechanism in line with the principles of natural justice<sup>2</sup>. The adjudicatory power of CCI is such that it is authorized to heavily penalize enterprises<sup>3</sup> indulging in

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<sup>1</sup> Civil Appeal No. 7779 of 2010

<sup>2</sup> Section 36 of the Competition Act states:

“In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.”

<sup>3</sup> Section 27 of the Competition Act states:

“Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—



anti-competitive covenants, forming cartels or abusing their position of dominance. According to the Section 36 of the Competition Act (2002), the principles of natural justice will be the pivot on which the discharge of functions of Competition Commission of India shall rest, and the Commission shall have the power to determine its own procedural regulations, although Central Government rules and other provisions of the Act will be overriding feature. By concentrating on the principles of natural justice, Section 36 ensures that the Commission's rulings and procedures in no way fail to fulfill the demands of justice, while on the other hand it is given enough leverage to develop its own regulatory procedures for discharging its functions. Its duties, contained in Section 18 of the Act, include 'ensuring elimination of practices that could adverse impact competition, safeguarding consumer interests, and ensuring right to freedom of trade of other participants of the Indian market'.

Nevertheless, there is significant controversy as to how far the proceedings under various sections of the Act must hinge on the principles of natural justice. Indian competition law jurisprudence has evolved significantly as is visible from the decisions and practices of the Commission and the directions given through the orders of Competition Appellate Tribunal ("COMPAT"), High Courts and the Supreme Court.

### **Locus standi**

Section 19 (1) (a) of the Act allows a party to file an Information with the Commission, "The mandate of the Commission is to inquire into any alleged violation of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either of its own accord or on (a) receiving formal information from any person, consumer or their association or trade association accompanied by such fee as has been determined by regulations; or (b) ...". An amendment of the Section transformed the words "a complaint" into "any information, in such manner and".<sup>4</sup> The purpose of introducing this change was to make it possible for the Commission to conduct an inquiry on receiving any information regarding any breach of the Act's provisions, rather than only on the receipt of a formal

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(b) Impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher."

<sup>4</sup> Competition (Amendment) Act, 2007

complaint.<sup>5</sup> Moreover, by using the words “any person” in Section 19, the Act allows a long rope to the Commission so that information can be accepted from any person irrespective of whether the said anti-competitive conduct has affected that person or not.

The case of Motion Pictures Association vs. Reliance Big Entertainment Pvt. Ltd. illustrates the point, wherein it was held by the COMPAT that the Informant (a movie producer) had the locus standi to file Information before the Commission since the decisions of the film distributors association, alleged to having been engaged in anti-competitive behavior, affected the Informant despite the fact that it was not the member of the association, and therefore, was not subject to the alleged anticompetitive rules.<sup>6</sup> The COMPAT while deciding the case of *Shree Jeetender Gupta vs. Competition Commission of India & Ors.*, held that “any person having no relation whatsoever with the subject cannot initiate the legal process under the CCI”.<sup>7</sup> According to the COMPAT, despite the Informant being an employee of the consumer company, he was neither the consumer of the product nor was he party to the transaction between the alleged dominant entity and the consumer company, and therefore, and the supposed deed of contravention was not in any way connected to him. Thus, the locus standi to file the Information did not rest with him. In another case, *L.H. Hiranandani Hospital vs. CCI & Ors.*, it was held by the COMPAT that though no qualifications have actually been suggested in the Act for determining the locus standi of an Informant, the Commission must be act prudently if the Informant is a third party or a mischief-maker, who may be having an ulterior motive for championing someone else’s cause.<sup>8</sup> In this case, the Informant was even required to pay a penalty by the COMPAT for hiding certain important pieces of information at the time of its filing, particularly on the basis of which the Commission could have formed a prima facie opinion that there has been no action in contravention of the Law.<sup>9</sup> However, it is not always possible to judge or assume the malicious intent. In the case of *Surendra Prasad vs. CCI & Ors. (Electricity Order)*, the appellant argued that the Informant could not file the Information as he had no locus standi for the same, an argument that was rejected by the COMPAT. The appellant’s contention was that the Informant was an advocate working with another attorney, who was representing the respondent’s rival in numerous cases and that the Informant had an ulterior motive for filing the information. The COMPAT,

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<sup>5</sup> 44th Report of the Standing Committee on Finance on Competition (Amendment) Bill, 2006

<sup>6</sup> Motion Pictures Association vs. Reliance Big Entertainment Pvt. Ltd., Appeal No. 69 of 2012, dated 17.05.2013

<sup>7</sup> Jeetender Gupta vs. Competition Commission of India & Ors., Appeal No. 30/2014, dated 04.07.2014

<sup>8</sup> L.H. Hiranandani Hospital vs. CCI & Ors., Appeal No. 19 of 21014, dated 18.12.2015

<sup>9</sup> Deepak Kumar Jain and Manoj Kumar Jain vs. Ors., Appeal No. 79 of 2014, dated 08.11.2016

however, held that this fact could not be considered sufficient for suspecting malafide intent of the Informant.<sup>10</sup>

In the case of Jitender Bhargava vs. CCI & Ors., the COMPAT, in the context of the appellant's locus standi, held that only the 'person aggrieved' can file an appeal.<sup>11</sup>

The Commission also held, in the case of Magnolia Flat Owners & Anr. vs. DLF Universal Ltd. & Ors., that under Section 42 of the Act, dealing with contravention of the Commission's orders, may be conducted either suo moto by the Commission or if any member of the public moves an application regardless of the whether such a member of the public was a participant at the time when the proceedings were initiated.<sup>12</sup>

### **Right to withdraw**

With regard to the Informant's right to withdraw the filed Information, it was held by the Commission that, "the Commission is not authorized to serve as a platform for negotiated settlement of the disputes between the parties. Instead, its objective is to ensure the elimination of practices that significantly affect competition in the Indian markets. It is for this reason, no mechanism for withdrawal or settlement has been provided for in the Act ...".<sup>13</sup> The Commission and the COMPAT have held similar stance in a large number of cases.<sup>14</sup>

### **Right to be heard**

The Supreme Court, in the case of CCI vs. SAIL (supra), noted that the rights of any of parties are not affected by the forming of the prima facie opinion and directing the Director General ("DG") under Section 26 (1) for initiation of investigative inquiry, since these are only administrative functions. It was also held that the principle of audi alteram partem need not be applied in the

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<sup>10</sup> Surendra Prasad vs. CCI & Ors. Appeal No. 43 of 2014, dated 15.09.2015

<sup>11</sup> COMPAT- Jitender Bhargava vs. CCI & Ors., Appeal No. 44 of 2013, dated 27.03.2014, para 11

<sup>12</sup> Magnolia Flat Owners & Anr. vs. DLF Universal Ltd. & Ors., Case no. 67/2010, order under Section 42 of the Act, dated 26.03.2014

<sup>13</sup> M/s Royal Agency vs. Chemists & Druggists Association, Goa & Anr., Case No.63 of 2013, dated 27.10.2015

<sup>14</sup> COMPAT's decision in Yogesh Ganeshlaji Somani vs. Zee Turner Ltd. & Anr., Appeal no. 31/2011, dated 21.03.2013); CCI's decisions in M/s Royal Agency vs. Chemists & Druggists Association, Goa & Anr., Case No.63 of 2013, dated 27.10.2015, Rohit Medical Store vs. Aashish Enterprises & Ors., Case No. 11/2010, dated 16.12.2010, Jupiter Gaming Solutions Pvt. Ltd. vs. Government of Goa & Anr., Case No. 15/2010, dated 12.05.2011, etc.



proceedings under Section 26 (1) of the Act. The Supreme Court observed in the context of an order passed under Section 26 (2) of the Act that curtails the right of the Informant, that despite the fact an order under the said section is an adjudicatory order, the Commission is not duty bound to give an oral hearing to the Informant. The Informant can, however, seek remedy only in the form of an appeal and Section 26 (2) of the Act does not even allow the Informant a right to notice before the passing of an order.<sup>15</sup> Supreme Court has further observed that as per the provisions of Regulation 17 of the CCI (General) Regulation, 2009, the Commission has been allowed complete authority and freedom to conduct preliminary conference where the Informant or any other person as may be necessary may be called to present a position on the matter for developing prima facie opinion.<sup>16</sup>

A Division Bench of the Delhi High Court, in the case of South Asia LPG Company vs. CCI & Ors. (LPA No. 857/2013, dated 03.09.2014), noted that if the DG's investigation report does not indicate any violation of the provisions of the Act, the Commission can exercise its discretion and order additional investigation without the alleged party being notified of the hearing.<sup>17</sup> It was upheld by the court that such order being entirely an administrative matter, has no bearing on the rights of any of the parties, and thus passing of such an order is not bound by the rules of audi alteram partem.

### **Formation of prima facie opinion**

The Supreme Court in the CCI vs. SAIL case (supra) and various judgments of the COMPAT have served to define the Commission's scope of enquiry for forming of prima facie opinion. It was held by the Supreme Court in the case of CCI vs. SAIL (supra) that the level of enquiry for passing an interim order under Section 33 of the Act is more intense than required for prima facie findings. In another case, without actually referring to the Act, it was held by the Supreme Court that, "prima facie findings do not indicate final proof of the case; rather it reinforces the idea that a case can be established if the supporting evidence of the case were to be believed. However, whether a prima facie case can be formed or not requires determining whether the evidence leads to the possibility of reaching the relevant conclusion in question and not whether that evidence could lead towards that conclusion alone".<sup>18</sup>

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<sup>15</sup> Supreme Court, CCI vs. SAIL, Civil Appeal No. 7779/2010, dated 09.09.2010

<sup>16</sup> Also see the judgment of COMPAT in Gujarat industries Power Company Ltd. vs. CCI & GAIL, Appeal No. 03 of 2016, dated 28.11.2016, for a similar discussion on the scope of Regulation 17.

<sup>17</sup> Delhi High Court, Division Bench- South Asia LPG Company vs. CCI & Ors., LPA No. 857/2013, dated 03.09.2014

<sup>18</sup> Nirmala J. Jhala v. State of Gujarat, (2013) 4 SCC 301

The COMPAT has in numerous cases held that for forming a prima facie opinion, the Commission only needs to examine the declarations included in the Information/Reference and the other documents attached along with.<sup>19</sup> Furthermore, the Commission is not authorized to intensely scrutinize the allegations included in the Information/Reference and document the details pertaining to the merits of the case in the context of the breach of the Act's provisions, because the process of in-depth examination can be undertaken only once the investigation report has been received.<sup>20</sup> Any material not revealed in the Information/Reference cannot be used by the Commission.<sup>21</sup> The Commission must restrict itself to the formation of prima facie opinion while scrutinizing the allegations given in the Information and avoid the mistake of seeking to finalize the investigations or conclusions at this stage. The COMPAT averred that the endeavor of the Commission must be to form a prima facie opinion regarding each of the contained allegations.<sup>22</sup>

It has been asserted by the COMPAT over and over that in the event of the recorded information leading to two different scenarios: with the first one allowing the formation of prima facie opinion pertaining to the flouting of the Act's provisions and the other scenario leading to an entirely different conclusion, the Commission is advised to rather begin with the investigation and not incline towards the latter stance. For instance, the COMPAT, in the case of K Sera Sera vs. DCI & Ors., noted that the Commission should have initiated investigation into the allegation that the market could be held captive exclusively on the basis of adopting certain standards in cinema technology rather than closing the case on the basis of the submission of the alleged parties by drawing the conclusion that the quality of cinema industry would have improved because of these standards, leading to further conclusion that the alleged standards would not adversely affect competition.<sup>23</sup> In the same way, the COMPAT, in the case of Meru Travels Solutions Private Ltd. vs. CCI and Uber, observed that deciding the case on the basis of prima facie evidence while ignoring the contradictory market reports produced by the Informant (stating that the alleged rival party had cornered the dominant part of the market) on the

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<sup>19</sup> Gujarat Industries Power Company Ltd. vs. CCI & GAIL (supra); Surendra Prasad s. CCI, & Ors., Appeal No. 43 of 2014, dated 15.09.2015; North East Petroleum Dealers Association vs. CCI & Ors., Appeal No. 51 of 2015, dated 26.11.2015

<sup>20</sup> Gujarat industries Power Company Ltd. vs. CCI & GAIL, Appeal No. 03 of 2016, dated 28.11.2016;

<sup>21</sup> North East Petroleum Dealers Association vs. CCI & Ors., Appeal No. 51 of 2015, dated 26.11.2015

<sup>22</sup> Gujarat Industries Power Company Ltd. vs. CCI & GAIL (supra); Surendra Prasad s. CCI, & Ors., Appeal No. 43 of 2014, dated 15.09.2015

<sup>23</sup> K Sera Sera vs. DCI & Ors., Appeal No. 79/2015, dated 08.12.2015

one hand and by the rival party on the other was not appropriate on the part of the Commission. The COMPAT observed that given the ambiguities in the case, the DG should have conducted a more intensive investigation, since only a detailed exercise would have allowed a clear perspective about the dominant market position of the opposing party.<sup>24</sup>

## **Right to seek review**

In another case involving Google vs. Competition Commission of India, the Delhi High Court ruled in favor of allowing a writ against the Commission's order, wherein it had refused to entertain an application for reviewing its earlier order passed under Section 26 (1). The Commission, in that case, refused the admission of a review application, arguing that there was no provision for review under the Act and that the provisions of Section 38 merely allowed for rectification of any mistake that is visible in the record. Delhi High Court observed that the alleged party suffers immense harassment on account of investigation by the DG, since evidence is recorded under oath, replete with cross-examination of witnesses, and custody of documents of the parties, and so review of the order cannot be denied under Section 26 (1). However, the Court also made it clear that the right to review cannot be considered absolute and must be cautiously allowed where the provisions of the Act do not appear prima facie to have been violated in the Information/Reference. The Court further advised on speedy disposal of review applications in order to prevent the review from becoming an intensive fact finding drill, since that would lead the Commission into the wall of Section 26 (8),<sup>25</sup> situation that was possible only once the investigation report has been tendered by the DG. With regard to the investigation by the DG being stayed during the review proceedings, it was held by the Court that the Commission was at liberty to decide whether or not to stay the investigation on case to case basis.<sup>26</sup>

## **Injunction**

Section 33 of the Act lays down very rigorous procedure for the grant of an injunction compared to deciding whether there has been prima facie contravention of the provisions of the Act, and requires proving that it has the potential to cause irreversible loss and tilt the scales of inconvenience in favor

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<sup>24</sup> Meru Travels Solutions Private Ltd. vs. CCI and Uber, Appeal no. 31/2016, dated 07.12.2016

<sup>25</sup> Section 26 (8)- If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

<sup>26</sup> Delhi High Court- Google Inc. & Ors. vs. Competition Commission of India & Anr., LPA No. 733/2014, dated 27.04.2015



of the applicant. For instance, in the case of Fast Track Call Cab Pvt. Ltd. vs. ANI Technologies Pvt. Ltd., it was held by the Commission that monetary loss alone cannot be categorized as irreparable loss to the applicant.<sup>27</sup>

### **Scope of Investigation by the Director General**

The Delhi High Court, in the case of Grasim Industries Ltd. vs. CCI, held that DG's investigation must be limited to the evidence that the Commission will consider for the formation of prima facie opinion, and there is no mechanism in the Act that permits the DG to investigate information not considered by the Commission. The Court made it clear that in the event of the Commission directing the DG in its prima facie consideration to inquire into the contravention of a specific provision of the Act and the DG's investigation report reckons that the provisions of the Act have indeed been violated then such an investigation report will be considered in accordance with the provisions of the Act. Moreover, the Court also held that in the event of the DG conducting investigation on the basis of information not taken into consideration by the Commission during the formation of prima facie opinion, even though that portion of the investigation report is not considered reliable enough to base its order under Section 27, the Commission has been authorized to deem it as a fresh information, implying that under Section 19 of the Act it can order suo moto enquiry on its basis.<sup>28</sup> Appeal was made against the judgment in Grasim case and the Division Bench of the Delhi High Court in LPA No. 137/2014 is in the process of hearing it.

On the issue of the party's right to have an advocate represent him/her before the DG, it has been held by the Delhi High Court, in the case of Oriental Rubber Industries vs. CCI & Anr., that the procedure that is carried out by the DG the conduct of investigation is similar to the procedure followed for a civil suit by the Civil Court, and besides, the DG has the authority to summon persons and record evidence, so the parties also have full right of being represented by an advocate under the Advocates Act, 1961 and neither the DG or the Commission can strike down this right by an order.<sup>29</sup>

### **Compliance Of Principles Of Natural Justice At The Stage Of Final**

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<sup>27</sup> Fast Track Call Cab Pvt. Ltd. vs. ANI Technologies Pvt. Ltd., Case No. 06 of 2015, Order under Section 33 of the Act, dated 03.09.2015

<sup>28</sup> Delhi High Court- Grasim Industries vs. CCI, W.P. (C) No. 4159 of 2013

<sup>29</sup> Delhi High Court- Orient Rubber Industries vs. CCI & Anr., W.P. (C) 11411/2015, dated 22.04.2016

## Adjudication

Various courts and tribunals have held CCI as a quasi-judicial body in numerous cases and that its binding principle will be that of natural justice.

One of the most important principles of natural justice is that the case must be decided by the one who hears it. In the case of *Lafarge India Ltd. vs. CCI & Ors.*<sup>30</sup>, the COMPAT overturned the order passed by the Commission under Section 27 of the Act levying a penalty on a number of cement manufacturers for forming a cartel and the case was remanded back to the Commission on one ground alone – that the final order was passed under Section 27 by the Chairperson of the Commission who on three occasions had not been present for hearing when submissions were made by the legal representatives of the charged parties. The Commission's arguments, that the proceedings of the case were not significantly affected by absence of the Chairperson since the final order had been passed by the Commission on the whole and the order had also been signed by all the other members of the Commission who had been present during the entire process of hearing and that all the relevant documents and submissions made by the charged parties had been thoroughly examined before passing of the final order, were rejected by the COMPAT on the basis of a ruling by the Supreme Court in the case of *A.K. Kraipak vs. Union of India* (1969 (2) SCC 262), wherein it was held that during the process of deciding the case, the Chairperson's views must have tilted the opinion of the other six Members of the Commission. Therefore, the principles of natural justice have not been upheld. The COMPAT has indicated similar stance in many other cases.<sup>31</sup>

In the same vein, the COMPAT observed that the principles of natural justice are violated if the final order is passed without giving the charged party a chance to present his side of the case. This cannot be just a technical formality; rather a proper notice for submission should be served to the charged party prior to the hearing. In its investigation report, in the case of *Surinder Singh Barmi vs. BCCI*, the DG found BCCI was misusing its position of dominance, and the Commission forwarded the same to the BCCI. The Commission's final order, wherein BCCI was found to be guilty of abusing of its dominant position, was based on evidence that had neither been used by the DG in its investigation report nor did the Commission communicate the same to the charged party prior to drawing of the

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<sup>30</sup> COMPAT- *Lafarge India Ltd. vs. CCI & Ors.*, Appeal No. 105 of 2015, dated 11.12.2015

<sup>31</sup> COMPAT- *AIOCD vs. CCI & Ors.*, Appeal No. 21 of 2013, dated 09.12.2016, *Coal India Ltd. vs. CCI*, Appeal No. 01 of 2014, dated 17.05.2016

final conclusion.<sup>32</sup> Besides, the charged party was not given prior information about variation in the definition of term ‘relevant market’ as used by the Commission and that given in the DG’s investigation report. The COMPAT, during appeal, held that the Commission’s stance was violative of the principles of natural justice because non-disclosure of such information to the charged party prevented it from mounting an effective defense for itself.

According to the COMPAT, before proposing any action against a party, it must be given sufficient opportunity to persuade the relevant authority that the basis for proposed action does not exist or even if it does it does not merit the action that is proposed.<sup>33</sup> Likewise, in the case of Shri Sunil Bansal vs. Jaiprakash Associates, the accused party was acquitted by the Commission, which leaned on a definition of market that differed from the one used by the DG, unknown to the Informant. The COMPAT ruled that the Commission’s approach violated the principles of natural justice because effective opportunity was not given to the Informant to contest the definition of market which formed the basis of the Commission’s final order.<sup>34</sup> Moreover, the COMPAT held that if the Commission disagrees with the DG’s findings/recommendations given in the investigation report then the Commission must put on record the reasons for dissenting with the same while the final order is passed, else it would indicate arbitrariness on the part of the Commission.

A key dimension of natural justice is its reasonableness. The COMPAT observed in the case of Excel Crop Care vs. CCI, that the imposition of penalty imposed must be commensurate with the damage caused giving sufficient grounds for the quantum of penalty imposed.<sup>35</sup>

## **Section 48 proceedings**

Section 48 (1) pertains to the liability of any person responsible for the anti-competitive conduct of the company and Section 48 (2) holds that vicarious liability can be imposed on any director, manager, secretary, or other officer of the company who was in-charge when the company committed the anti-competitive act. Significantly, the DG is usually directed to also probe the people who were

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<sup>32</sup> CCI- Surinder Singh Barmi vs. BCCI, Case No. 61/2010, dated 28.02.2013

<sup>33</sup> COMPAT- BCCI vs. CCI & Anr., Appeal no. 17 of 2013, dated 23.02.2015

<sup>34</sup> COMPAT- Sunil Bansal vs. Jaiprakash Associates, Appeal No. 21 of 2016, dated 28.09.2016

<sup>35</sup> COMPAT- Excel Corp. Care vs. CCI, Appeal No. 79 of 2012, dated 29.10.2013

Also see for similar discussion, the judgments of COMPAT in- Lupin Ltd. & Ors. vs. CCI & Ors. Appeal No. 40 of 2016, dated 07.12.2016; ECP Industries Ltd. vs. CCI, Appeal No. 47 of 2015, L.H. Hiranandani vs. CCI, Appeal No. 19 of 2014, dated 18.12.2015; National insurance Co. & Ors. vs. CCI, Appeal No. 94 to 97/2015, dated 09.12.2016



responsible (or who were in-charge of the affairs of the company) for the conduct of the allegedly violative company when the said contravention/violation occurred as well as when the Commission passes a prima facie order under Section 26 (1). However, it is also significant to note the observation of the High Courts<sup>36</sup> and the COMPAT<sup>37</sup> that if it cannot be found that the provisions of the Section 27 of the Act have been violated by the company then liability cannot be imposed on such persons as mentioned in Section 48 (1) and (2). However, confusion exists as to whether the Commission must first determine the contravening act by the company under Section 27 of the Act and begin the proceedings afterwards, including directing the DG to investigate as per Section 48 of the Act, or that it is possible to conduct both the processes simultaneously.

It was held by the Delhi High Court in the case of *Pran Mehra vs. CCI & Anr.* that the Act has not been designed to adopt two carry out two separate proceedings simultaneously, implying that the company and its important officers cannot be made to undergo two different sets of procedures. It was further held by the High Court that when proceeding with respect to a company are being conducted, the important or the key officers of the company shall be allowed to argue that they did not commit or encourage the commission of the violative act and that they in fact employed due diligence to prevent the violation. The key-persons can put forth these arguments without distorting the essential context, i.e., whether, in the first place, the company had indeed violated the Act's provisions or not.<sup>38</sup>

Kerala High Court also ruled somewhat similarly in the case of *B. Unnikrishna vs. CCI*. It was held by the Kerala High Court that there is no provision in the Act that validates conducting two separate proceedings with respect to the company under Section 27 or its office bearers under Section 48 of the Act. The scheme of the Act provides for composite proceedings, implying that investigation of any person allegedly guilty under Section 48 of the Act must be synchronized with the investigation

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<sup>36</sup> Delhi High Court- *Pran Mehra vs. Competition Commission of India & Anr.*, W.P. (C) 6258/2014, dated 26.02.2015

<sup>37</sup> COMPAT- *EIMPA vs. Manju Tharad & Ors.*, Appeal No. 17 of 2012, dated 14.12.2012; *Nandu Ahuja vs. CCI & Anr.*, Appeal No. 11 of 2011, dated 17.01.2014; *Chemists & Druggists Association [Ferozpur] vs. CCI & Ors.*, Appeal Nos. 21/2014 to 28/2014, dated 30.10.2015; *Swapan Kumar Karak vs. CCI & Ors.*, Appeal No. 42 of 2014, dated 07.12.2015; *Shib Sankar Nag Sarkar & Anr. vs. CCI & Anr.*, Appeal No. 34/2014, dated 10.05.2016; *A.N. Mohana Kurup vs. CCI & Ors.*, Appeal No. 05 of 2016, dated 10.05.2016; *Alkem Laboratories & Ors. vs. CCI & Ors.*, Appeal Nos 09,14 and 15 of 2016, dated 10.05.2016; *Bengal Chemists & Druggists Association vs. CCI & Ors.*, Appeal No. 37 of 2014, dated 10.05.2016; *Lupin Ltd. & Ors. vs. CCI & Ors.*, Appeal No. 40/2016, dated 07.12.2016

<sup>38</sup> Delhi High Court, *Pran Mehra vs. Competition Commission of India & Anr.*, W.P. (C) 6258/2014, dated 26.02.2015

into the guilt of the company.<sup>39</sup>

The COMPAT, however, looks at the issue differently. The COMPAT, in the related cases of A.N. Mohana Kurup vs. CCI & Ors.<sup>40</sup> and M/s Alkem Laboratories Limited vs. Competition Commission of India and Another<sup>41</sup>, held that given the fact that Section 48 presumes key officers of being guilty of contravening acts of the company, the spirit of the provision must be implemented in entirety, implying that only once it has been determined that the company has violated the provisions of Section 27 of the Act that the provisions of the two sub-sections of Section 48 can be invoked.

In the case of Ministry of Agriculture and Farmers Welfare vs. Mahyco Monsanto<sup>42</sup>, while giving due regard to the order of the COMPAT mentioned above, the Commission did not find it suitable to be used as a precedent. The Commission was of the view that investigations can be started by the DG under Section 26 (1) against the important personnel for the purpose of prima facie order, and that it is not required that company is charged first by the Commission of contravention under Section 27 of the Act. The Commission decided the case on the basis of the conclusions drawn by the Delhi High Court in Pran Mehra (supra) case and a number of other rulings of the Supreme Court as well as various High Courts, in which importance has been given to the provisions of pari materia contained in various other laws.

## **Need for effective Regulations**

Over the years, the Commission has gained immense experience which coupled with various judicial reviews allows it sufficient basis to refine and update the procedures adopted at various stages during the entire judicial process.

Despite the fact that several orders of the Commission have been overturned by the COMPAT because it considered those orders violative of the principles of natural justice as well as following of incorrect procedures, the requisite modifications in the General Regulations have not been undertaken by the Commission, maybe due to the fact that appeals pertaining to those issues are sub-judice before the

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<sup>39</sup> Kerala High Court- B. Unnikrishnan vs. Competition Commission of India, W.P. (C) 22534/2016, dated 23.09.2016

<sup>40</sup> A.N. Mohana Kurup vs. CCI & Ors., Appeal No. 05 of 2016, dated 10.05.2016

<sup>41</sup> M/s Alkem Laboratories Limited vs. Competition Commission of India and Another, Appeal No. 09/ 2016, dated 10.05.2016

<sup>42</sup> CCI- Ministry of Agriculture and Farmers Welfare vs. Mahyco Monsanto, Ref. Case No. 02/2015, dated 26.07.2016

apex court.

Nevertheless, the important points that emerge from the preceding discussions are:

- (i) Giving an opportunity to the alleged party to submit its position when the prima facie case is being formed- The Supreme Court, in the case of CCI vs. SAIL (supra), allowed the Commission to exercise its discretion as to whether or not the parties would be heard, but the recent history of the Commission indicates that preliminary conference is held wherein both parties i.e., the Informant and the opposing party are given a hearing. This definitely is a more desirable approach as it significantly prevents the possibility of filing of writ petitions, for either reviewing the prima facie order (in terms of the Google order of the Delhi High Court (supra)) or staying the investigation by the DG through a writ decree.
- (ii) Giving the Informant and the Opposing Party a notice to speak after the investigation report has been submitted by the DG - The general practice is that the DG's investigation report is forwarded by the Commission to the Informant as well as the charged parties so that they can file their objections and suggestions, but it does not reveal its own investigation report containing its own opinions and conclusions as well as the recommendations of the DG. The final order is passed by the Commission after due consideration of their objections and suggestions. It has often been seen that the Commission's final order reflects evidence/considerations that did not form part of the DG's report and was considered by the DG to draw relevant conclusions or make recommendations. The COMPAT has, however, held several times that the principles of natural justice are violated with this approach since it deprives the parties of the knowledge of the evidence used by the Commission for its own investigation report, and this further deprives them from putting forth their defense and/or refute the allegations. Therefore, the COMPAT holds that sufficient notice must be provided to the parties by the Commission. The foregoing discussion clearly indicates that the Commission would do well to communicate to the parties its own investigation report containing its own opinion and also the reasons for its agreement/disagreement with each and every conclusion or recommendation made by the DG in its investigation report. Such procedural modifications would be effective in preserving the Commission's final orders at the time of judicial review, usually on the grounds of violation of the principles of natural justice and procedural unfairness. The courts will be eased of excessive burden of appellate litigation. Thus, the Commission as well as the parties stands to benefit from such procedural modifications.
- (iii) Allow the party to plead against the issue of penalty if violation is proved- Significantly, the factors for determining the quantum of penalty differ from the issues pertaining to establishment of

the Act's violation, even though imposition of penalty is merely the outcome of the violation being established. Determination of penalty must be based on a range of factors specifically relevant to the case being considered like the aggravating and mitigating factors. A proceeding where all the issues are combined, i.e., determination of contravention of the Act as well as the quantum of penalties to be imposed, frustrates any attempt of effectively considering factors that may affect decision pertaining to the quantum of payable damages, thereby resulting in failure of judicial system. Therefore, justice would be better served if the Commission considers the issue of penalty in a separate hearing after establishing whether or not the contravention has occurred. The Commission would also do well to specify the basis for the calculation of damages payable, by assigning value or due weightage to the various aggravating and mitigating factors.

### **Conclusion**

The foregoing discussion makes it amply clear that the Commission's job can be best done by adopting procedures that safeguard the principles of natural justice. Competition Laws in India have evolved considerably in the past seven years or so, although there still remain numerous procedural issues that need to be finally established or determined, perhaps settled by the apex court resolutions on such issues. Nonetheless, the Commission can enhance the effectiveness of its functioning by periodically amending its Regulations to incorporate emerging realities and orders of the COMPAT and the courts.

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