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Unsettling The Settled: Who Has The Locus Standi To Approach Competition Commission of India? NCLAT Answers

Niti Richhariya (Competition Commission of India) · Friday, July 17th, 2020

On May 29, 2020, the National Company Law Appellate Tribunal (“NCLAT”) rendered a decision in the matter of *Samir Agrawal v. CCI & Ors.* wherein it *inter-alia*, ruled that the *locus standi* to approach Competition Commission of India (“Commission”) under the Competition Act, 2002 (“Act”) lies only with a person “*who is either a consumer of the goods/services in question or a beneficiary of healthy competitive practices in a given market*”. The decision has created unrest as it is ostensibly against the scheme of the Act which allows any person to approach the Commission against anti-competitive market practices. Additionally, the decision also appears to be in conflict with the precedent established by its predecessor, i.e., Competition Appellate Tribunal (“COMPAT”), as discussed in detail below.

In this blog, I focus on the findings of NCLAT pertaining to the *locus standi* of an Informant to approach the Commission and analyze them in light of the existing legal provisions and relevant precedents.

Facts of the case:

Mr. Samir Agrawal (“Appellant/Informant”), an independent law practitioner filed information with the Commission alleging contravention of Section 3 of the Act by a “*hub and spoke cartel*” formed between the cab aggregator brands (being the hub), namely; Ola and Uber and the drivers (being the spokes) using these cab aggregators’ mobile application and sought investigation. The Appellant alleged that the pricing algorithm used by these cab aggregators for providing radio taxi services facilitated their collusion with the drivers and among drivers as well. The Commission, vide its [order dated 06.11.2018](#), observed that no agreement, understanding or arrangement appeared to exist either between the cab aggregators and their respective drivers or between the drivers *inter se* regarding the price-fixing. The Commission, therefore, ruled that no *prima facie* case of contravention of Section 3 of the Act existed to order an investigation by the Director General and the matter was closed in terms of Section 26(2) of the Act. Aggrieved thereof, the Appellant assailed the Commission’s order before NCLAT.

NCLAT’s Decision

While adjudicating on the Informant's right to approach the Commission, NCLAT referred to Section 19(1) of the Act and noted that the Act provided for three modes for the Commission to take cognizance of an alleged contravention of provisions of the Act: (i) either on its own motion, or; (ii) through information from 'any person', consumer or their association or trade association or; (ii) through a reference made to the Commission by the appropriate Government or statutory authority.

Interpreting the term 'any person', NCLAT opined that though PILs, class action, etc have watered-down the concept of *locus standi*, given a statute like the Act provided for peculiar modes to take cognizance of a matter, "*it has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices*". The NCLAT justified adopting this restrictive interpretation to prevent "*unscrupulous people*" with "*oblique motives*" from targeting any enterprise under the provisions of the Act.

Analysis

Legal Context – Scheme of the Act

The Act establishes the Commission as an antitrust watchdog to regulate the free market economy of India. The Preamble and Section 18 of the Act conjointly entrust the Commission with a duty to "*eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of the consumers, and ensure freedom of trade carried on by other participants, in markets in India.*" Thus, it is clear that the Commission has a specific mandate of protecting larger public interest by eliminating anti-competitive practices. To help the Commission achieve these objectives, Section 19(1)(a) of the Act provides for the above-mentioned three modes to take cognizance of a matter. The term 'any person' used in Section 19(1)(a) of the Act, when interpreted literally demonstrates that the Act imposes no requirement of a necessary nexus between an informant and him being directly affected by the subject matter of dispute in order to enable him to approach the Commission. It is pertinent to note here that Section 19(1) of the Act was amended in 2007 and the words "*receipt of information*" were inserted to replace the words "*receipt of complaint*". The said amendment signifies the legislative intent of encouraging the public at large to bring to light any potential antitrust violation and help the Commission curb such practices at the earliest. Moreover, it must be borne in mind that the proceedings before the Commission are proceedings *in rem*^[1] and not proceedings *in personam* and thus the Commission is not concerned with the dispute *inter se* private parties. The Act further provides for an in-built safeguard in terms of Section 45 of the Act which empowers the Commission to penalize informants (upto INR One crore) who file false information or willfully omits material facts or altered, suppressed or destroyed any relevant documents.

Precedents

The erstwhile COMPAT, the predecessor of NCLAT was tasked to adjudicate on the issue of *locus standi* to approach the Commission in *Shri Surendra Prasad v. Competition Commission of India and others*^[2]. The COMPAT focused on the legislative intent behind modes of taking cognizance for the Commission and held that the plain language of Section 18 and 19 read with Section 26(1)

of the Act nowhere showed that the Parliament had prescribed any qualification or condition to file information under Section 19(1)(a). COMPAT clarified that the requirement of the informant to have a personal interest in the matter could not be read into when the same reasoning did not flow from the language used in the Act.

Further, in *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd.*^[3], the Commission also dealt with the issue of *locus standi* and clarified that the Act permitted any person to file information before it without suffering any personal grievance from the alleged conduct. Notably, there have been several instances^[4] in the past wherein the Commission took cognizance of anti-competitive practices prevalent in the market based on the information filed by a **charitable trust** that was not a direct victim of the alleged conduct and has taken strict actions against such practices thereby working towards protecting consumer interests.

Thus, it can be seen that the narrow interpretation given by NCLAT as regards *locus standi* not only severely limits the rights of a common man to approach Commission but also imposed restrictions on the Commission regarding its commitment to eliminate anti-competitive practices from the market. The decision goes against the scheme of the Act and also stands contrary to the precedent established by COMPAT which raises doubts about the correctness of findings relating to *locus standi* of the Informant contained in the said judgment. However, it remains to be seen whether the Commission appeals against the NCLAT's decision before Hon'ble Supreme Court of India to get this contentious issue settled once and for all.

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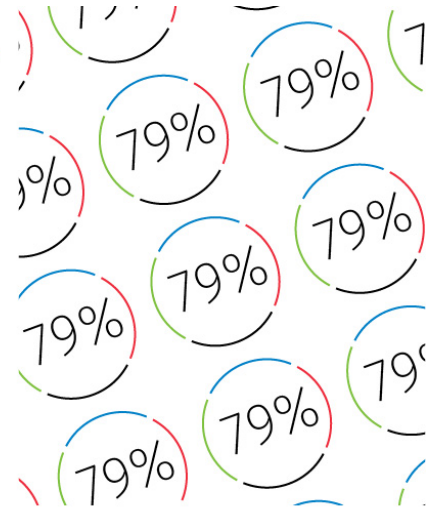
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