An Ode to the Competition Appellate Tribunal(COMPAT)

K.K. Sharma*

When the first appellate body on competition law matters COMPAT came on to statute, alongwith the enactment of Competition Act (Amendment) Act,2007 in September, 2007, and when it actually came into existence through the notification dated May 15,2009 issued by Ministry of Corporate Affairs, Government of India, who could have imagined that barely 8 years down the line, it would be on its way to become history. Such are the strides of time - which alone is the ultimate reality according to the learnings contained in ancient texts.

The enactment of Finance Act, 2017 brings curtains down to this tribunal which has been in existence from the time the powers of enforcement of competition law were given to the Competition Commission of India(CCI) and all the appeals against the orders of CCI were heading towards it. After the intended merger with National Competition Law Appellate Tribunal (NCLAT) is complete, all such appeals against the orders, directions or decisions of CCI shall be going towards NCLAT. At this point of transition, a look back in time on the time gone by in its existence is what this write up consists of.

The author, who drafted regulations for the functioning of the CCI and established the competition law investigation framework for the country as the very first Director General of the functional Competition Commission of India and also established Merger Review Format for the country, presently, is a practicing advocate as the Chairman of KK Sharma Law Offices and had opportunities of appearing before COMPAT in different matters. He looks back at the this important juncture in the evolution of competition law appellate architecture of the country.

With the grant of the Presidential ascent to the Finance Bill 2017 on 31.03.2017, the Finance Act 2017 came into existence on 01.04.2017. Along with this, an era in the evolution of competition law jurisprudence in the country has come to an end. This is also the day when, in terms of the proposals contained in the Finance Act 2017, an institution known as the Competition Appellate Tribunal (COMPAT) is proposed to be merged with another existing tribunal known as National Company Law Appellate Tribunal (NCLAT) established under Companies Act 2013. One of the amendments contained in the Finance Bill 2017 made a change to Section 53B of the Competition Act (the Act) and that

* Chairman, KK Sharma Law Offices and ex Director General and Head of Merger Control and Antitrust Divisions, CCI. The author can be contacted on kksharmairs@gmail.com or kksharma@kkslawoffices.com.

changes the contours of the appellate architecture for all matters arising out of violations of competition law in India. The net effect of this amendment is that all the cases presently being adjudicated by COMPAT shall be heard by the NCLAT after the merger is fully in place. It is not just that only COMPAT is getting merged into NCLAT but another seven tribunals are also getting merged with some other existing tribunals, perhaps, as an execution of the intent of the present Government reflected in its commitment elaborated in the earlier media interactions of Honourable Prime Minister Narendra Modi in the motto of "Minimum Government, Maximum Governance" and also reflected in the re-alignment of various ministries of the Central Government in the beginning of the present leadership coming into power. If we have a look at the parliamentary debate on 21.03.2017, the stated rational behind merging of these tribunals was stated to be as under :

> "*there are some laws in which tribunals have been created which have such inadequate work that a tribunal may sit only for half-an-hour or one hour.*"[1]

Apparently the Government was working on rationalisation of tribunals and removing the perceived deadwood from the governing apparatus for quite some time. It appears that the whole thing was done after thinking for quite some time and also involving Indian Law Institute (ILI) on the issue and considering some 30 plus tribunals and assessing their purpose and scope of work as well as the work load. It was a result of this exercise involving ILI which, perhaps, after examination, has resulted in the present exercise of rationalisation and restructuring of these tribunals.

If we look back, in June, 2016 the erstwhile Company Law Board (CLB) was merged with NCLAT which also was given powers to dispose of the pending matters before the CLB. This was very much on the cards after the new Companies Act 2013 came into force. Similarly two more appellate tribunals viz. the Appellate Tribunal for Prevention of Money Laundering and the Appellate Tribunal Forfeited Property (NDPS) were also merged by creating a provision for pending appeals to be heard by the Appellate Tribunal under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act,1976 (SAFEMA) through the Finance Act, 2016. Thus, in a way, the exercise had begun a bit earlier but the bigger implications of this are visible now. The total numbers of tribunals which have been restructured and merged with other existing tribunals are being given here in below in a tabular form:

Tribunals to be merged by amendments to the Finance Bill, 2017

Tribunal being replaced	**Tribunal to take over functions**
Competition Appellate Tribunal (under Companies Act, 2013)	National Company Law Appellate Tribunal
1. Airports Economic Regulatory Authority Appellate Tribunal	Telecom Disputes Settlement and Appellate Tribunal (under the TRAI Act, 1997)
2. Cyber Appellate Tribunal	
National Highways Tribunal Authority of India Act, 1994)	Airport Appellate Tribunal (under the Airport
Employees Provident Fund Appellate Tribunal	Industrial Tribunal (under the Industrial Disputes Act, 1947)
Copyright Board	Intellectual Property Appellate Board (under the Trade Marks Act, 1999)

1 http://164.100.47.193/newdebate/16/11/21032017/2To3pm.pdf

Railways Rates Tribunal	Railway Claims Tribunal (under the Railways Claims Tribunal Act, 1987)
Appellate Tribunal for Foreign Exchange	Appellate Tribunal (under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976)

One very interesting aspect which deserves discussion is that all these amendments which, practically, made their existence of some 8 tribunals disappear were made a part of Finance Act, 2017 only and this Finance Act, 2017 was piloted in the Parliament as a Money Bill. Reference to Money Bills is found in Articles 107, 108, 109, 110 & 111 of the Constitution of India. For a ready reference the concerned articles are being extracted below:

*"**107.** (1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.*

(2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

***108.** (1) If after a Bill has been passed by one House and transmitted to the other House— (a) the Bill is rejected by the other House; or (b) the Houses have finally disagreed as to the amendments to be made in the Bill; or Salaries and allowances of members. (c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has elapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill: Provided that nothing in this clause shall apply to a Money Bill.*

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses: Provided that at a joint sitting— (a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to

the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill; (b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed; and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

***109.** (1) A Money Bill shall not be introduced in the Council of States.*

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

***110.** (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:— (a) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund; (d) the appropriation of moneys out of the Consolidated Fund of India; (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).*

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.

***111.** When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:*

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom. Procedure in Financial Matters"

Thus, strictly speaking, as seen from the above provisions of the constitution of India, normally, a Bill is said to be a Money Bill only if it contains provisions relating to taxation, borrowing of money by the Government, expenditure from or receipt to the Consolidated Fund of India. We may notice how carefully the framers of the Constitution had attempted to ensure that the charecter of a Bill should not be changed to Money Bill just to suit the convenience of some. It is for this reason that Article 110(2) very clearly says that *a Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.* This is certainly indicative of the care which was sought to be exercised while classifying a bill as Money Bill.

If the freedom to access funds is not given, the functioning of the Government may be adversely affected. Therefore, perhaps, for ensuring smooth functioning of the Government, the procedure of passage of Money Bill is a little easier for any ruling combination, if it has adequate numbers in Lok Sabha but not in Rajya Sabha. However as it is not possible to come up with all the possibilities of the future, a residual clause in the form of clause (g) stating that *any matter incidental to any of the matters specified in sub-clauses (a) to (f)* was also to be treated as Money Bill. In earlier debates on the issue the focus on the word "only" in Article 110(1) was understood to mean that it has to be strictly construed and the bills should not be classified as Money Bill in a routine manner. However, the provisions of clause (g) can be used as a prop to classify a bill as Money Bill to suit convenience as nearly everything has a financial impact. This is a completely different strand of thought and can only be touched elsewhere separately.

As far as the Parliamentary procedure is concerned, a Money Bill can only be introduced in the lower house known as Lok Sabha on the recommendation of the president. Lok Sabha can pass the money Bill by a simple majority of all Members present and voting. After this, the bill may be sent to the Rajya Sabha and Rajya Sabha can also submit some recommendations. However on getting recommendations of Rajya Sabha, it is totally within the domain of Lok Sabha whether to agree to the recommendations of the Rajya Sabha or not to agree and reject them. Further, if no such recommendations are forthcoming within a period of 14 days, the bill is deemed to have been passed by the Parliament. Thus Lok Sabha has a much greater say in the

passage of Money Bills. It is much easier to handle a Money Bill if the ruling combination has a strength of numbers in the lower house but not necessarily in the upper house. The authority to certify that if a bill is an Ordinary Bill or a Money Bill is extremely significant. This power, under article 110(3) of the Constitution of India lies with the Speaker of Lok Sabha. In connection with an earlier bill, this power is already being questioned in a petition before the Hon'ble Supreme Court. The decision of the Speaker on this issue is final as of now. Knowing the present numbers of the ruling combination in Lok Sabha presently but not having equally impressive numbers in Rajya Sabha, it is natural for ruling combination to prefer a Bill being called a Money Bill than to classify it otherwise if it wants to ensure the passage of the bill smoothly. It could be for these reasons of practical convenience that the Bill was labelled as the Money Bill while piloting it through Lok Sabha. We find that even before this earlier two bills, in 2015-16, were also passed as Money Bills. These were the Insolvency and Bankruptcy Code 2015 and Aadhar Bill. Government, while facing cricism in the house, tried to justify its stand as to how the bills were connected with financial matters. As these actions would result in reduction of expenditure being spent by the Government on the overheads and salaries, the reason used to axe COMPAT, while including the amendment in Money Bill may not be too wrong. However, as the introduction of Adhar Bill as Money Bill is already facing a judicial challenge, the issue needs to be carefully deal with.

Perhaps, this turn of events could not have been anticipated on 15.05.2009 when vide notification number S.O. 1240(E), the institution of COMPAT was established by the Ministry of Corporate Affairs for discharging the duties and functions under Section 53A of the Competition Act 2002. The COMPAT has, so far, been chaired by three former Justices of Hon'ble Supreme Court. Honourable Justice Dr. Arjit Pasayat held the Chairmanship of COMPAT from 20.05.2009 to 09.05.2012. He was followed by Honourable Justice V S Sirpurkar from 22.05.2012 to 21.08.2014 and Honourable Justice G.S. Singhvi from 25.09.2014 to 11.12.2016. As of present, after the term of Justice G.S. Singhvi was over, no new chairperson of the COMPAT has been appointed and, in the interregnum, the charge of Chairmanship of COMPAT has been given to the senior most Member, Mr. Rajiv Kher, to discharge the functions of the Chairman for a period of six months.

For an institution created with great hope in 2009 and which existed for a period of about seven years, it must be said that COMPAT dealt with a wide spectrum of cases whether they were transferred to it on the dissolution of Monopolies and Restrictive Trade Practices Commission (MRTPC) or the cases dealt with by the Competition Commission of India (CCI). Section 66 of the Competition Act 2002 provides a mechanism for dealing with the fate of the cases which were pending before the MRTPC Act on the date when MRTPC ceased to exist. Some of the pending cases were to go to COMPAT whereas the others were go to CCI. A balance residual number of cases were to go before the National Commission constituted under the Consumer Protection Act 1986(CPA). Thus, in terms of sub-sections (3) (4) and (5) of Section 66 of the Act, the following was expected be the broad division of the work pending before the MRTPC on the date its existence is supposed to cease:

> ***(a)*** All the cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases in which Unfair Trade Practice ('UTP') alleged), before MRTPC shall after a period of two years shall stand transferred to COMPAT and dealt with under the MRTPC Act, 1969 ; and

(b) All the cases pertaining to UTP other than those referred to in clause (x) of sub-section (1) of Section 36A of MRTP Act and pending before MRTPC, or expiry of two years, shall stand transferred to the National Commission constituted under the CPA.

(c) All cases which were pending before Director General (I&R) relating to unfair trade practices, at various stages., MRTPC will stand transferred to CCI

Having had its inward stream of cases coming from either the erstwhile MRTPC or from newly instituted and empowered CCI, the COMPAT has disposed off a good number of cases. In terms of the details furnished by the CCI in its annual report the cases dealt with by CCI and the numerical performance of COMPAT, till the end of 2015-16, is being given here under:

(The following data is obtained from Annual Report of CCI for the year 2015-2016)

Table 2: Appeals against Orders* of the Commission[2]

Year	No. of Orders Passed by Commission	No. of Orders, which were passed by the Commission during the year, is Appealed against	Percentage of Orders Appealed (%)
2009-2010	06	02	33..33
2010-2011	73	12	16.44
2011-2012	130	40	30.77
2012-2013	87	38	43.68
2013-2014	103	33	32.04
2014-2015	103	31	30.10
2015-2016	130	34	26.15
Total	632	190	30.06

*Issued under Section 26(2), 26(6), 27 and 33 of the Act.

Table No. 3: Disposal of Appeals by the COMPAT[3]

Year	No. of Orders* Passed by the COMPAT			
	Upholding Commission's Orders	Setting Aside Commisison's Orders	Remanding Commission's Orders	Total
2009-2010	00	01	00	01
2010-2011	08	00	00	08
2011-2012	15	01	01	16
2012-2013	35	05	00	40
2013-2014	64	44	44	108
2014-2015	45	06	02	51
2015-2016	49	87	67	136
Total	216	144	114	360

(*The data in table no. 2 & 3 are not comparable. It is possible that there are more than one order passed by the COMPAT while disposal of multiple appeals against a single order of the Commission.)

2 http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf
3 http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf

Going by the figures given in these reports by the CCI, it is seen that it has disposed off a wide number of cases despite having gaps in absence of full-fledged Chairman. This is as regards the quantitative performance of disposal by COMAPT is concerned but qualitative performance is a different thing altogether. On this front, we notice that, in addition to having done good quantitative disposal in the brief seven years period of its existence, the COMPAT has dealt with many cases which have given a new direction to competition law jurisprudence in country.

The COMPAT considered it necessary to order investigation directly to the Director General (DG) in some instances instead of setting aside an order to be decided afresh by CCI, COMPAT has direcrtly ordered investigation by DG. Perhaps, it was a reaction after having seen a number of cases where the CCI was sent back its earlier order for review and passing a fresh order. Nearly in all the instances, the Commission returned back its orders without any change and that, perhaps, gave an indication to the COMPAT that irrespective of gentle nudging to CCI, the outcome does not change much even if the Commission is asked by COMPAT to follow the principal of natural justice and come up with an appropriate new outcome. These instances have been noticed in the case of Surendra Prasad, Meru Travels, Air Cargo, Gujarat Industries Power Company Limited (GIPCL), K. Sera Sera Digital Cinema. In all these cases, the COMPAT has considered it appropriate to directly order investigation the issues. This also has been a period when new principles have either been accepted or have been raised and appeals against such orders are pending in higher forum. As an example, in the case of *Exclusive Motors* v. *Automobile Lamborghini*, the concept of single economic entity, also known as Copper Weld doctrine in America, was accepted in India. The COMPAT agreed with the Commission that one person cannot conspire with oneself . Thereafter, the COMPAT agreed with the finding of the CCI.

Second very important land mark case is that of Excel Corp Care Limited in which COMPAT did not find good reasons to sustain the penalty of 10% of average turnover of last three years and held that, in absence of detailed reasons for imposing penalty, the penalty cannot be imposed on total turnover. Here was an issue whether the CCI would have fared better if there were guidelines for imposing penalty as we have today in developed jurisdictions. After having held in the case of Excel Crop Care, the COMPAT has also followed up this particular judgement in other cases. The opinion of COMPAT in matters relating to single economic entity was expressed confirming the order of CCI and COMPAT in the following words

"While arriving at a conclusion about the relevant turn over it would be open to the authorities like CCI to rely on the general principles expressed in those guidelines regarding the method of calculation etc. However, it should be an endeavour of the authorities to apply those principles not mechanically or blindly but after carefully considering the factual aspects."

In another case of *Dr. L H Hiranandani Hospitals* v. *CCI*, the COMPAT set aside the majority order passed by CCI. This was a very interesting case wherein the Commission as well as the minority dissenting order authors agreed that no specific violation either under Section 3(3) or Section 3(4) are made out. However, the COMPAT did not appreciate the view of the majority Members in CCI wherein, despite having not come under express mandate under Section 3(3) of the Act and 3(4) of the Act, the Commission invoked the penalty imposition merely because it is not fitting into 3(3) and 3(4) of the Act. The sub Section 3(1) does not provide a

mechanism of such ominous nature. Thus minority order was sustained and majority order was not agreed with by COMPAT.

Similar was a case of *Kapoor Glas* v. *Schott Glass*. In this case, a huge fine on Schott Glass was imposed. However, the dissenting Member was not convinced and suggested that whatever has been done by Schott Glasses is what anybody could have done. In this case, the dissenting order, practically, became the final order of the COMPAT.

It will be wrong to say that we have understood the function for the COMPAT unless we do spend some time in discussing the *CCI* v. *Steel Authority India Limited*. In this case, exclusive tie up of railways with SAIL was considered a violation of Section 3(4) of the Act by the informant. In this case, after the investigation was ordered by the CCI, SAIL preferred an appeal before the COMPAT. It was interesting from the point of view that after direction of investigation under Section 26(1) of the Act by CCI, there is no provision under Section 53B of the Act for appeal. Thus, while order under Section 26(2) is appealable, an order under Section 26(1) of the Act is not appealable. COMPAT admitted this matter and passed an order. The CCI appealed against this order before Supreme Court as to how COMPAT can entertain an appeal when it is not provided under the Act. While disposing of this order on this appeal filed by CCI against COMPAT, Hon'ble Supreme Court has been very kind and came out with a detailed order which, practically, is the outline of the objective of the competition law and how it is being dealt with and how it should be dealt with.

Despite not going beyond seven years of existence, it can be said with satisfaction that COMPAT did serve a useful purpose in the evolution of competition law jurisprudence in the country in the initial years.