Section B

Articles

Are Genuine Informants Shying Away From CCI?

K K Sharma*

Way back in September, 2007, the Competition Act, 2002 (the Act) was amended by the Competition (Amendment) Act, 2007 (the Amendment Act). This had become necessary on account of numerous legal challenges to the implementation the competition law in India despite the enactment of the Act in January, 2003. These amendments added an altogether new chapter creating a new appellate structure in between the decisions of the Competition Commission of India (the Commission) and the Supreme Court which was not existing in the original Act as enacted in January, 2003. Thus came into existence a new body known as the Competition Appellate Tribunal (COMPAT). In addition to this amendment, the Amendment Act also made many significant amendments to the Act. One such amendment was replacement of the word 'complaint' with ' information' in section 19 of the Act. This write up limits itself to looking only at this amendment to section 19 of the Act.

The author who assisted the Commission in drafting the regulations for various aspects of the functioning of the Commission and headed the Antitrust Division of CCI to actually implement these regulations in real practice and also was the first Director General of the functional Competition Commission of India examines the implication of this amenmdment in this article.

In September 2007, Indian Parliament passed the Competition (Amendment) Bill 2007(Amendment Bill) amending the Competition Act 2002 (the Act). A substantial number of amendments were made by Competition (Amendment) Act 2007 (hereafter referred to as Amendment Act) and many of them were considerably

* 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.

significant and meaningful. One of these amendments was the amendment in section 19(1)(a) of the Act in which the word 'complaint' had been replaced with word 'information'. When we look at the statement of 'objects and reasons' to the Amendment Bill, it is having only a cryptic remark that the word 'complaint' shall be replaced by the word 'information'. For a ready reference the relevant part of the statement of 'objects and reasons' of the Amendment Bill is being extracted below:

> *"13. In section 19 of the principal Act, in sub-section (1), in clause (a), for the words "receipt of a complaint,", the words "receipt of any information, in such manner and" shall be substituted."*

It does not go into the details of the difference between the words 'complaint' and 'information', the reasons necessitating this change and what would be the significance of this amendment. Thus looking into the explanatory notes and statement of objects and reasons which, generally, are the key to understanding the import of amendment does not throw any light on the issue of this particular amendment.

However, before the enactment of the Amendment Act, the Amendment Bill introducing this law had to pass through a Standing Committee on Finance of the Parliament. The Forty Fourth report of the Standing Committee on Finance (the Committee) does throw some light on this issue. The relevant parts of the report of the Committee are being extracted below:

"Clause 11: Amendment of section 19 (Replacement of the word 'Complaint' with 'Information')

> *35. The Clause reads as under:*
>
> > *In section 19 of the principal Act, in sub-section (1), in clause (a), for the words "receipt of a complaint,", the words "receipt of any information, in such manner and" shall be substituted.*
>
> *36. As per the Ministry, the replacement of the word 'complaint' with 'information' has been sought as:*
>
> > *"The term information is wider and has an inclusive meaning. Even a complaint may be treated as information and action taken. Also, this change would enable the Commission to inquire into any information received on controvention of provisions of the Act, instead of only on receipt of a complaint. In fact, the ability to act on information gives CCI a better articulated regulatory role."*
>
> *38A. The Ministry in a subsequent reply stated as under:—*
>
> > *"Clause 24 of the Bill provides that under section 36 (1), the Commission shall be guided by the principles of natural justice which shall ensure that in the process of an inquiry by the Commission, the concerned parties would be given opportunity of being heard before any final order is made."*
>
> *39. Further, proviso 1(a) of Section 19 of the Principal Act reads as under:—*
>
> > *"receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association."*
>
> *40. In this regard, the Ministry, in one of their post evidence replies, had inter-alia stated that:—*
>
> > *"Since information is to be accompanied by prescribed fees, it is expected that frivolous information may be minimized."*
>
> *41. However, when further probed by the Committee on whether an informant would be required to pay fee, the Ministry later stated as under:—*
>
> > *"This would be kept in consideration while framing the rules under section 19. However, it has to be ensured that access to CCI is not used for vexatious or frivolous purposes."*

What becomes clear from the above report of the Committee is that the regulatory role of the Commission was sought to be widened by replacing the word 'complaint' with 'information'. This is

sought to be balanced by, firstly, introducing a fee which is to accompany any information to be filed before the Commission and, secondly, by the existence of the Section 36(1) in terms of which the Commission is to be guided by the principle of natural justice. These are enough means to ensure that frivolous and vexatious informations are not filed before the Commission and, even if filed, are dealt with appropriately by the Commission within the existing legal framework without enhancing the workload of the Commission by way of abuse of the process of law.

This was to ensure that not only the Commission does not become a battle ground for competitors to take on each other but also the genuine persons having informations about the violations are not barred from bringing the instances of violations of competition law before the Commission by having the burden of proving their *locus standi* by having to prove the nexus of the anticompetitive conduct with any injury to them. This was necessary to ensure that this new law, aimed to promote competition in the markets, does not get stunted, right in the early stages of its growth, because of either an element of fear or being out of reach in the minds and hearts of the people having the knowledge of the violations of the competition law without having either any axe to grind or any benefits accruing to them out of the information being submitted before the Commission. It was in this context that despite being told that the fee was not an entry barrier for filing information but only a mean to reduce frivolous information being filed before the Commission, the Committee advised the Government to look into the aspect of introduction of a fee to be accompanied with information very carefully.

If we compare this with other adjudicatory proceses under other laws, one thing becomes quite obvious and it is that wherever the laws use the word 'complaint', the intent is that these are 'adversarial proceedings'. The meaning of the term 'adversarial proceedings' is that there are two or more parties to the complaint - a party which files the complaint and other(s) against whom the complaint is filed or who are otherwise likely to be adversely affected as an outcome of these proceedings. It is the duty of the court/forum to examine the complaint and see what can be done to address the grievances contained in the complaint. In this system, the grievance is a *'sine qua non'* for initiation of any matter under that law. No such requirement is there, if the initiation of the investigation is not on the basis of a complaint but an information from somebody who comes to know about any violation of any law under which the information is filed.

For a proper comparison, if we look at situation in which a passerby notices that somebody is illegally thrashing another person on the street, the person seeing this incident of crime can act as a responsible citizen and dial 100 to call the police control room or, by any other means, inform the police. The job of this person informing the police ends at this point. The concerned law enforcement agency, including police, may not be required to record a statement or give further information in the matter as a matter of routine. If that is required, it would be purely as a witness of the happening and not beyond. It is quite possible that it may become necessary for the concerned Investigation Officer (IO) to collect more information and for procuring such information, details may be sought from this person but only in the capacity as a witness and not as an affected party. These details will not be in the capacity of interested party having necessarily a nexus with the outcome the investigation. Therefore, the obligation on the investigation agency and the enforcement agency in cases where the triggering of the institution of the case or

Legislature intended to keep competition law violations on a similar pedestal as violation of the laws where the triggering of an investigation is based on filing of an information and not as a suit in a civil case

investigation is on the basis of 'information' is much more in-comparison to the instances where the triggering event for a legal dispute or investigation is by filing of a 'complaint'. Conversely, the onus on the person filing a 'complaint' is much more than on the person filing an 'information' as regards the evidence is concerned.

If we further compare the two in terms of the court fees applicable, it may be noted that in case of civil suits when one party is aggrieved and stands to gain at the end of the resolution of the dispute, it is generally required to pay a substantial court fee linked to the relief sought in the 'complaint'. This is appropriate as a compensation to the state for maintaining an elaborate machinery for redressal of legal disputes and restoration of rights of the litigants which result in some material benefits to the persons making complaint or filing suits. Although there is a fee to file an information before the Commission but it is only a token amount to file information and not based on any link with the outcome of the act of filing information. This is in line in with the reply of the Ministry of Corporate Affairs to the Committee that the fee was only to discourage filing of frivolous information.

The intent of the law enforcement machinery, the law and the Government is very clear as these incidences of violation of the civil laws, other than the violations similar to the violations of the Act are not instances of public nuisance but nuisance to an individual or organisation whose rights and duties are being infringed upon, therefore, they are supposed to bear a part of the entire expenses in the process. On the contrary, it does not really directly help a citizen if dacoities and murders or violations of competition law are less or more except the impact on the directly affected parties. However, it is the job of the Government to ensure that in favour of maintenance of law and order or violations of competition law such do not occur as maintenance of law and order is one of the primary responsibilities of the Government.

In absence of any other detailed elaboration given in the statement of objects and reasons to the Amendment Bill, it is difficult to infer anything directly from the Amendment Bill as piloted in both the Houses of Parliament except to rely on the generalisations as has been done in the preceding paragraphs and the report of the Committee where it talks of the amendment involved.

This implies that the legislature intended to keep competition law violations on a similar pedestal as violation of the laws where the triggering of an investigation is based on filing of an information and not as a suit in a civil case. It is the economy and the common man which are the victims of such conduct and the victims are too many to come together. It has been repeatedly treated worldwide that forming cartels is supposed to be most pernicious violation of competition law and that such activities are akin to robbing the pockets of countless helpless consumers and customers.

The gain, whether small or big, to any one victim of anti competitive conduct is neither the intent of the law nor the end of the process of investigation and adjudication in competition law. It may

be the starting process of investigation but not the end because of the fact that even if the allegations of the violations of competition law are proved to be true, the benefits would be to countless customers and consumers. It is for benefit to the society and considered almost at par with the maintenance of law and order. Apparently, this was the reason that the language of section 19(1) was changed from using the word 'complaint' to using the word 'information' instead. The use of word complaint could have been inferred to mean that only when a victim can come forward with a personal grievance because of the violation of competition law and showed the extent of harm afflicted on him, could a case be made out. If that was the case, the scope of competition law investigation would have been considerably limited and its impact on the economy also would have been substantially less.

As is very widely known, whether it is cartelisation or abuse of dominant position, the outcome of these proceedings and order applies not only to the individual victim who might have come with the information but applies to all the people affected by similar practices or instances. In abuse of dominant position, there is definite identifiable party and, in addition to many others, this identified or identifiable party can also benefit from outcome of the investigation by the Commission.

Be that as it may, this change made by the Amendment Act was a significant one. This change also gave a signal that the prevention of violations of competition law including the abusive or anti competitive conduct was the main aim of the legislature and not necessarily the identity or the name of the person who comes with information about the anti competitive conduct before the Commission. The only requirement of such a person was that the person coming with such an information of an anti competitive conduct should have adequate knowledge of the violations alleged to be taking place. The knowledge should be enough to assist the Commission to reach a 'prima facie' opinion on the violations of the Act. It is quite possible, at times, that the knowledge of anti competitive conduct given by the informant may not be complete in itself but may still form the basis of a suo-moto investigation by Commission. If properly investigated and supplemented by the efforts of the Commission independently, the information submitted can really be a great starting point of investigation into an anti competitive conduct. This being so, the identity of the person who comes forward with an information is indeed not of much significance in the entire process. On the contrary, what is significant is the contents of the information and the evidence collected and submitted before the Commission.

In the circumstances, the identity of the Informant should better be kept under wraps unless there are reasons to the contrary. This is broadly a practice world over and the biggest of cartels have been unearthed and detected by anonymous telephonic calls, letters and tip offs. These cases are normally listed and cited as cases of anti competitive conduct against the name of the violator without necessarily revealing the name of the informant.

However, if we compare the listing of cases on the website of the Commission, it is seen that cases are listed in the form of A vs B implying thereby that,despite the amendment to the Act, by way of Amendment Act, the practice followed by the Commission in the format of displaying its orders on its website has created a situation where serious potential informants will have to think twice before coming forward with credible informations before the Commission. There is fear that the Commission may become a place for

settling scores by way of 'abuse of dominant position' complaints(actually information in terms of the present language of the Act) by rivals and vested interests who do not have any fear of filing of information while, on the other hand, it may discourage genuine people who are the victims of perpetrators of anti competitive conduct by violators of the competition law as they may fear that disproportionate commercial harm may visit them if they reveal the existence of anti competition practices by a connected big market player.

It is not necessary that the people who are practicing this law should have identical experiences as regards handling of clients who, sometimes, come with information on the violation of the Act. However the author is really confident to the share the experience he has gathered in last four years as practitioner of this law that the real victims of abuse are so scared of seeing their name in media or on the website of the Commission to be known to entire world that, even if they are in possession of extremely critical information which can pin down the perpetrators of the anti competitive conduct called opposite party by the Commission, they are mortally scared to do so. If the real concept of informant, as desired by the Amendment Act, was used there was no need to use the term Opposite Party. This practice of writing the orders of the Commission as Informant v/s the Opposite Party format is indeed doing a great harm and disservice, to this new fledgling law, by way of discouraging the persons having the genuine informations about the violations of competition law in their possession.

Contrary to this, if the onus of maintenance of confidentiality was given to the Commission and the revealing of the name of the informant would have been an exception than the norm, chances were that the majority of persons and citizens of this country, who are in possession of sensitive information on violation of anti competitive conduct, would have come forward in the hope that their name would remain secret.

There may be some people who may want to see their name in media, print and visual such people would rather be too happy filing information in their own names. The Commission should guard against such people and, if it is not done, it can become a place of extortion and blackmailing by which, after filing information against the Opposite Party, the informants themselves may start approaching the Opposite Party (OP) to satisfy their demands as a case has been filed against the OPs by these people before the Commission. So this may actually trigger a culture of blackmail and arm twisting. Therefore, if Commission makes it a policy of not at all declaring the names of Informant which, in any case, does not add any value to the proceedings and merit of the case and makes it a practice to hear Informant in camera unless the Informant is comfortable and is willing to be known and seen in public, it may substantially enhance the trust and confidence of the public in the Commission. This may lead to an enhanced credibility of the Commission and increase in the number of information being filed before the Commission. The number of information being filed before the Commission has not shown the rise expected before a new competition agency in a big and growing economy having the legacy of substantial anticompetitive practices across markets.

This difference between 'complaint' and 'information' has been wee appreciated by COMPAT and has been eminently articulated in Appeal No. 43 of 2014 in the matter of Shri Surendra Prasad Vs. Competition Commission of India and others. The relevant part of the order of COMPAT is being extracted below for a ready reference:

> *"22. It is significant to note that Parliament has neither prescribed any qualification for the person who wants to file an information under Section 19(1)(a) nor prescribed any condition which must be fulfilled before an information can be filed under that section. There is nothing in the plain language of Sections 18 and 19 read with Section 26(1) from which it can be inferred that the Commission has the power to reject the prayer for an investigation into the allegations involving violation of Sections 3 and 4 only on the ground that the informant does not have personal interest in the matter or he appears to be acting at the behest of someone else. As a matter of fact, the Commission has been vested with the power to suo moto take cognizance of any alleged contravention of Section 3(1) or Section 3(4) of the Act and hold an inquiry. This necessarily implies that the Commission is not required to wait for receipt of a reference from the Central or the State Government or a statutory authority or a formal information by someone for exercising power under Section 19(1) read with Section 26(1) of the Act. In a given case, the Commission may not act upon an information filed under Section 19(1)(a) but may suo moto take cognizance of the facts constituting violation of Section 3(1) or Section 3(4) of the Act and direct an investigation. The Commission may also take cognizance of the reports appearing in print or electronic media or even anonymous complaint/representation suggesting violation of Sections 3 and 4 of the Act and issue direction for investigation under Section 26(1). The only limitation on the exercise of that power is that the Commission should feel prima facie satisfied that there exist a prima facie case for ordering into the allegation of violation of Sections 3(1) or 4(1) of the Act."*

Thus, even the COMPAT has displayed the broad sweep of section 19, after the Amendment Act.

If we look at the most famous cases of cartelisation what immediately comes to mind are vitamen cartel, elevator cartel, cartel of glass manufacturers etc. and we notice that the names of the information providers are not, generally, in public. Interestingly, the websites of different authorities which successfully dealt with these cartels and penalised the members of cartel, do not mention the names of the party which came along with the information. Indeed, in many cases, the source of many cases was telephone call where the caller did not want his name to be known. These were the investigations directed against some big parties but not necessarily at the behalf of some known party. If we compare the website of the Commission, we find such instances of information being filed by annonymous parties in a huge minority. Even if such instances are there, they carry an apology of being an exception as they stand out by names such as ABC v/s a big company or XYZ v/s another big company or anonymous v/s some other big company. Some examples are being given below:

- *XYZ* v. *Shri Hiralal Sharma Case No. 92 of 2014*
- *XYZ* v. *Bengal Ambuja Housing Development Limited Case No. 60 of 2014*
- *XYZ* v. *M/s Penna Cements Case No. 07 of 2014*
- *XYZ* v. *M/s Super Smelters Limited Case No. 58 of 2014*
- *XYZ* v. *Principal Secretary, PWD, Govt of Madhya Pradesh & Ors Case Nos. 50 of 2014*
- *Anonymous* v. *Bengal Greenfield Housing Dev. Co. Ltd. & Ors Case No. 103/2013*

In this arrangement, the majority of the orders placed on the website of the Commission make the person who wants to be anonymous stand out and look different as in every other case the person who is filing the information is prominently displayed with name and address. On the contrary, what would have been appropriate, especially in

view of the change in the Act, after the amendment of September, 2007, that name of the informants should have been the exception rather than the norm. That scenario would give confidence to the informant that his identity is not going to be revealed the public. In the present scenario, when in majority of the instances, the identity of the informant is public, it is very difficult to believe that your name would remain secret while you take on big giants to the Commission for their violation of the competition law.

Although not investigated, as far as the public knowledge is concerned, by the Commission, one of the reasons of the number of violations being brought to the knowledge of the Commission not going up gradually, even after 7 years of the powers of enforcements having been given to the Commission, could be an innocously embedded routine practice of the Commission presenting different cases on its website and in its orders under section 26(1), 26(2) or 27 of the Act. This practice has tremendous potential of keeping the genuine informants away from the Commission. Whether, it adds value to the any of its proceedings as far as Commission is concerned is any body's guess. In such a situation, it would really be of interest to understand as to how this practice survives.