PRIVATE ENFORCEMENT OF COMPETITION LAW: REVISITING THE LEGAL FRAMEWORK IN INDIA

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Private enforcement is one of the lesser explored ways of enforcing competition law, wherein an entity is empowered to claim infringement of competition law and compensational remedies for the same. Although it is a popular practice in several jurisdictions, it has remained terribly underutilised in the competition law regime in India. The poor drafting of the provision, which entails establishment of a competition law infringement by an adjudicatory body as a precondition and requires calculation of damages beforehand, has resulted in widespread apprehension and the subsequent underutilisation of the concept in India. This Paper argues in favour of a strengthened mechanism for privately enforcing competition law in India and seeks to reconcile the several objectives of competition regime of the country. It delves into the reasons of the gross underutilisation of such a mechanism despite there being a primitive yet established provision. It analyses the unique position of India as a developing economy and attempts to place it against other world economies with established private enforcement mechanisms. It looks into the current Indian framework and uses a comparative analysis to find out the global best practices that India can adapt within its legal framework. It seeks to arrive at a viable regulatory framework that would further the growth of private enforcement within competition law, as well as achieve the objectives of the competition law regime in the country.

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I. INTRODUCTION

The Competition Act, 2002 ('the Act') was enacted to deal with several anti-competitive conduct and practices and to ensure and promote fair and healthy competition in the market.[1] In India, the Competition Commission of India ('CCI') has two statutory avenues via which it may deal with anti-competitive conduct, viz, public enforcement and private enforcement.

'Public enforcement' refers to the examination of an anti-competitive agreement or abuse of a dominant position either through the initiation of an inquiry by the authorities themselves or on receipt of a reference from any person.[2] This is the usual route followed by the CCI. Upon investigation and offering a due opportunity for the parties to be heard, the CCI can pass orders to protect the

[1] The Competition Act, 2002.

[2] Nimit Rajesh Goyal, *The Promise of Private Enforcement of Competition Law in India,* IndiaCorpLaw, May 6, 2022, available at https://indiacorplaw.in/2022/05/the-promise-of-private-enforcement-of-competition-law-in-india.html (Last visited on August 12, 2024).

interests of consumers. By its very nature, the CCI can pass forward-looking orders, including orders to cease and desist and imposition of penalties. The CCI itself has no explicit compensatory power to remedy the harm caused due to anticompetitive conduct.[3] This is where the concept of privately enforcing competition law comes into the picture.

'Private enforcement', enumerated under §53N of the Act, on the other hand, is unexplored. Private enforcement of competition law occurs when a party, injured owing to established anti-competitive practice, makes a claim for compensation upon the infringing party to make good the loss suffered as a result of anti-competitive practices.[4] Private enforcement in relation to competition law is a recognised, well-known and pulsating method of enforcement in the United States of America ('U.S.') constituting the majority of the cases with the Department of Justice and Federal Trade Commission.[5] On the other hand in the United Kingdom ('U.K.') and European Union ('EU'), traditional public enforcement techniques were followed and competition law enforcement was under the purview of administrative authorities. But with the advent of time and with passage of the Competition Act, 1998, and the Enterprise Act, 2002, private enforcement of competition law disputes has been encouraged.[6]

Though there are pending cases which await a verdict on private compensation claims,[7] to date, there has not been a single decided case with respect to private enforcement under

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3 The Competition Act, 2002, §27.

4 D.J. Gerber, *Private Enforcement of Competition Law: A Comparative Perspective* in The Enforcement of Competition Law in Europe (Möllers & A. Heinemann eds., 2007).

5 Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, BYU L. Rev., 315 (2011).

6 Gerber, *supra* note 4; Roger Van Den Bergh, *Private Enforcement of European Competition Law and the Persisting Collective Action Problem*, Vol. 20(1), Maastricht Journal of European and Comparative Law, 16 (2013).

7 *See* UPL Ltd. v. Food Corpn. of India, Civil Appeal No. 3432 of 2020 (Supreme Court of India); MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., 2011 SCC OnLine CCI 52.

India's competition paradigm. The National Company Law Tribunal ('NCLAT'), responsible for deciding on private enforcement claims, has put compensation applications in abeyance where competition infringement decisions appealed to the Supreme Court of India ('SC') are yet to be decided.[8] While final rulings by the SC will encourage filing of private enforcement claims, India is far from a robust legislative framework necessary to sustainably balance the twin objectives of enhancing consumer welfare and facilitating economic growth.[9]

Therefore, private enforcement of competition law has been a popular and structured practice in several jurisdictions, it has remained terribly underutilised in India. This lack of regulatory mechanism has resulted in the denial of compensatory relief to many who have suffered due to economic giants' anti-competitive practices. This denial has severely compromised one of the main objectives of the competition law regime of the country-consumer welfare.[10]

Presently, claims relating to competition law have been on the rise, with the concerns no more being limited to just regulating economic competition or curbing anti-competitive practices,[11] but expanding to ensure effective deterrence by imposition of fines, and remedying the affected parties through compensation.[12] This approach of compensating the losses to the aggrieved parties requires robust private enforcement mechanisms.

The CCI has been actively trying to further the development of the Indian competition framework so as to advance India's economic standing while at the same time, promoting the welfare of consumers. During and post-pandemic, the CCI and the central

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[8] Siddharth Balani, *Private Enforcement of Competition Law: Tussle between Traditional & Alternative Forums and Reliefs,* Vol. 4(5), International Journal of Law Management and Humanities, 2291 (2021).

[9] Geeta Gouri, *Economic Evidence in Competition Law Enforcement in India* in Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects (Jenny, F. & Katsoulacos, Y. eds., 2016).

[10] Balani, *supra* note 8, 2294.

[11] The precise nature of these claims has been discussed in detail in Part III of this paper, below.

[12] Balani, *supra* note 8, 2291.

government have brought in several notifications making significant changes. Among these was the Competition (Amendment) Act, 2023, which introduced the commitments mechanism in the country. Through this mechanism, potential violators of the Act can settle with the CCI by proposing structural and behavioural remedies[13] against potential anti-competitive conduct.[14] Unsurprisingly, the amendment remains silent on the aspect of private enforcement. However, as the authors will argue in Part V, the commitment mechanism in itself threatens the development of private enforcement in India.

The introduction of a strong framework for private enforcement of competition law regime will help reconcile the objectives of the competition law in the country. This is because one of the objects of competition law in India is to protect the interests of customers while promoting and sustaining competition in the markets.[15] As will be discussed in the subsequent parts of the paper, a mere public enforcement mechanism is incapable of sufficiently protecting consumer interests. The Paper attempts to establish that only with a strong private damages regime can India aim to remedy and protect consumer interests adequately.

This Paper argues that India needs a robust mechanism for private enforcement of competition law owing to its unique economic standing. It revisits the current framework with respect to private enforcement of competition law using comparative analysis with other jurisdictions that have varied economic standings. In its

[13] For instance, Amazon committed to not using non-public seller data for its retail business, treating sellers equally for Buy Box rankings, displaying a second competing offer, setting non-discriminatory Prime qualification criteria, allowing Prime sellers to choose any carrier, and not using carrier information for its logistics services. This was accepted by the European Commission, *see* European Commission, *Antitrust: Commission Accepts Commitments by Amazon Barring it From Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime*, December 20, 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777 (Last visited on July 24, 2024); *See also* Oscar Borgogno & Giuseppe Colangelo, *Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores?*, Vol. 67(3), The Antitrust Bulletin, 451 (2022).

[14] The Competition (Amendment) Act, 2023.

[15] Preface to the Competition (Amendment) Act, 2023.

analysis, the paper evaluates the existing framework, identifies gaps and suggests reforms for the same. The authors argue that despite being a fast-moving economy, India has not been utilising its private enforcement regime to the best extent in the realm of competition law.

By carrying out a comparative analysis of different practices carried out throughout the world, the paper argues for a more structured framework and clear position of law in India. The paper not only argues for a framework, but also provides detailed analysis so as to guide the policymakers in enacting necessary model laws. The paper looks at recent developments in the Indian competition law regime, including the Competition (Amendment) Act, 2023, and identifies the scope for development of a model framework.[16] The paper also focuses on how, despite these developments, the Indian legislators have been silent on bringing forth a framework for private enforcement of competition law.

In Part II, this paper discusses the concept of private enforcement along with its relevance and significance. In Part III, the paper focusses on India and its private enforcement regime within the sphere of competition law. Here, the paper answers a significant question of why there has been a gross underutilisation of this mechanism despite there being a provision facilitating the same under the Competition Act, 2002. In Part IV, the paper looks at the unique Indian paradigm with its developing economy and argues that strengthening the private enforcement regime would help India achieve its competition law objectives, while at the same time, further economic growth. In Part V, an attempt is made to design a model framework for policy makers to adapt and incorporate in the current legal regime. Part VI concludes the discussion.

II. PRIVATE ENFORCEMENT OF COMPETITION LAW: ITS SIGNIFICANCE AND RELEVANCE

Private enforcement can be defined as "litigation initiated by an individual, a legal entity, an organisation, or a public entity to have a court establish an antitrust infringement and order

[16] The Competition (Amendment) Bill, 2022, Cl. 40.

the recovery of damages suffered and impose injunctive reliefs".[17] Competition law, as a matter of public policy, does not generally deal with providing compensation to private parties adversely affected by an infringement but with the investigation and punishment of infringements so as to deter such behaviour in future.[18] The primary means of enforcing competition law is exclusively through competition law authorities established in various jurisdictions such as the CCI in India.[19] Compensation for damages constitutes the greatest incentive and most useful instrument with respect to private enforcement of competition law.[20]

As a matter of procedure, the CCI initiates an investigation in one of three ways: either by way of information filed, reference filed by the government, or by taking *suo moto* cognisance.[21] The damages are imposed by the CCI only after the Director General ('DG') conducts an investigation and CCI finds a violation.[22] Then private enforcement or procedure under §53 can begin after an alleged contravention is established and the party seeking damages applies for compensation before the NCLAT.[23]

This part highlights the significance and relevance of strengthening the private enforcement regime in India. In doing this, this Paper first defines the meaning of 'private enforcement' in the context of the antitrust regime in India and differentiates it from the dominant public enforcement system. Then, it highlights the

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[17] EUROPEAN COMMISSION, *Green Paper - Damages for the Breach of EC Antitrust Rules,* COM/2005/0672.

[18] Francesca Richmond, *Arbitrating Competition Law Disputes: A Matter of Policy*, February 9, 2012, Kluwer Arbitration Blog, available at https://arbitrationblog.kluwerarbitration.com/2012/02/09/arbitrating-competition-law-disputes-a-matter-of-policy/ (Last visited on January 25, 2023).

[19] For instance, the Competition Commission of India (CCI, India), Australian Competition & Consumer Commission (ACCC, Australia), the Bureau of Competition, Federal Trade Commission (FTC, US), the Competition Commission (UK), among others.

[20] William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, Vol. 4(1), JOURNAL OF LEGAL STUDIES (1975).

[21] The Competition Act, 2002, §19.

[22] *Id*., §27.

[23] *Id*., §53.

advantages and potential disadvantages of the concept, which builds upon our core argument of bolstering the private enforcement regime in India.

In the last part of this section, the Paper focuses on the introduction and evolution of the concept of privately enforcing competition law in different parts of the world. Through this, the Paper identifies the common as well as unique features of these countries which forms the basis of the authors' hypothesis, arguing India's similarities with these and the subsequent need to bring changes in the Indian paradigm.

III. FEATURES & ADVANTAGES OF PRIVATE ENFORCEMENT OF COMPETITION LAW

The primary purpose of a competition enforcement body is to prevent anti-competitive conduct. A major purpose of public enforcement is to ensure effective deterrence by detecting breaches of competition laws, adopting infringement decisions, and punishing perpetrators.[24] Action that is driven by ensuring deterrence is an important element of this preventive strategy. Private claims play an important role in compensating victims as well as deterring violations.[25] Private enforcement of competition law can also achieve deterrence, although often through a compensatory rather than a punitive lens.

Working unilaterally or in tandem with public enforcement, it can enable companies and consumers to contribute to antitrust enforcement and to seek compensation for harm caused by anticompetitive behaviour.[26] In many countries, including several EU states, private enforcement has resulted in substantial compensation being awarded to victims, as well as led to discovery of anti-competitive

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[24] International Competition Network, *Development of Private Enforcement of Competition Law in ICN Jurisdictions*, July 9, 2019, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/CWG_Privateenforcement-2019.pdf (Last visited on July 26, 2024) ('ICN').

[25] J.P. Davis & R.H. Lande, *Defying Conventional Wisdom: The Case for Private Enforcement*, Vol. 48, Georgia Law Review, 1 (2013).

[26] ICN, *supra* note 24.

conduct that would have otherwise remained undiscovered.[27] While such 'discovery' may not be possible in the Indian framework under §53N, considering it allows for compensation claims only 'after' a contravention has been established by the CCI,[28] the impact on deterrence cannot be overstated.

An important idea attached to private enforcement of competition law is corrective justice. It gains relevance in any area of law when there is a failure of compliance and deterrence. In contrast with deterrence and prevention, corrective justice is 'backward looking',[29] i.e., it deals with a situation 'after' a violation is established. It can be understood as a 'transactional equality' between the offending and the aggrieved party.[30] It attempts to restore the *status quo* before the commission of the contravening act.[31]

It thus involves two elements — *first*, offsetting the undue gain by the offender, and *second*, compensation of the loss caused to the aggrieved party.[32] In a circumstance where there is only a public enforcement authority, only the first element of this twin-requirement is met, i.e., some gain is offset owing to a fine that may be imposed. However, the aggrieved firms and parties are left with no redress owing to the anti-competitive conduct. Therefore, private enforcement enables correcting the wrongs done to such players and instilling faith in the larger antitrust framework of a territory.

The theory of deterrence that underpins the majority of public enforcement policies assumes that businesspeople make rational, self-interested, and deliberate decisions to engage in

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[27] *Id*.

[28] The Competition Act, 2002, §53N.

[29] Caron Beaton-Wells & Kathryn Tomasic, *Private Enforcement of Competition Law: Time for an Australian Debate,* Vol. 35(3), UNSW Law Journal, 648 (2012).

[30] Ernest J. Weinrib, *Corrective Justice*, Vol. 77, Iowa Law Review, 403, 404 (1991).

[31] Ernest J. Weinrib, *The Gains and Losses of Corrective Justice,* Vol. 44, Duke Law Journal, 277 (1994).

[32] *Id*.; Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, Vol. 77, Iowa Law Review, 515, 538 (1991).

anti-competitive conduct. According to this theory, they are only likely to be deterred when the expected costs of such conduct, particularly costs through the use of legal sanctions, are likely to exceed the expected benefits of engaging in the conduct.[33] This implies that a potentially 'offending firm,' is aware of the legal sanctions not only from the public authority overseeing competition law, but also private players that may be impacted by its potentially anti-competitive conduct. Even if the damages awarded is not of an exemplary nature as in the U.S., compensatory justice itself is likely to serve as a substantial deterrent.[34]

The European Court of Justice ('ECJ') has recognised that actions for damages based on anti-competitive conduct is an "integral part of enforcement of these rules," and deters firms from engaging in such conduct.[35] There is considerable evidence that supports the theory that a higher rate of compliance is achieved when multiple actors possess the ability to file claims for redressal.[36]

In the context of India's CCI, private enforcement implies not only sanction in the form of fines by the CCI, but also potential damages to be paid by the contravening party to aggrieved

[33] Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law*, Vol. 4, Competition Law Review, 7 (2007); Wouter P.J. Wils, *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, Vol. 30, World Competition: Law & Economics Review, 197 (2007).

[34] European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC (2008) 404 ('EC White Paper').

[35] Vantaan Kaupunki v. Skanska Industrial Solutions Oy, Case C-724/17, ECLI:EU:C:2019:204 (2019), ¶45.

[36] Neil Gunningham et al., Shades of Green: Business, Regulation, and Environment, 35-38, (2003); Vibeke Lehmann Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?*, Vol. 35, Journal of Law & Society, 309 (2008); Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, Public Law, 63 (2003); Peter May & Søren Winter, *Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy*, Vol. 18, Journal of Policy Analysis and Management, 625 (1999); Peter Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, Vol. 8, Governance: An International Journal of Policy, Administration and Institutions, 527 (1995).

companies and firms. Faced with the possibility of having to pay fines as well as damages to parties, the 'cost' of engaging in anti-competitive conduct becomes too high.[37] Such additional deterrence in the form of private 'damages' is important, especially when mere fines are increasingly being considered ineffective in acting as sufficient deterrents.[38]

This is why this Paper argues that private enforcement is not in 'contrast' to the public enforcement system of the CCI but rather 'adds' value to it by ensuring effective deterrence. Public and private enforcement should be viewed as complementary tools, as both serve the same ultimate goal of ensuring optimal compliance with competition rules. Public enforcement through sanctions may be punitive, depending on the system, but is, in any event, intended primarily to achieve deterrence. That is one of the reasons it is extremely important for competition agencies to be transparent about public enforcement decisions. Private enforcement has the specific goal of retribution or corrective justice, and shall, depending on the system also have deterrent and punitive effects.[39]

Some scholars argue against the usefulness of private enforcement by claiming that it would discourage leniency.[40] This is because the members who were likely to participate in such leniency programs would be deterred as the reduction in penalty would have no effect as private enforcement claim costs would be much higher.[41] For clarity, leniency programs allow companies to 'self-report' anti-

[37] *See* Wells & Tomasic, *supra* note 29.

[38] Organisation for Economic Co-operation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws*, 12–15, U.N. Doc DAFFE/COMP (2002) 7 (April 9, 2002).

[39] ICN, *supra* note 24.

[40] Sinchit Lai, *Incentivizing Private Antitrust Enforcement to Promote Leniency Applications*, Vol. 17(3), J. Comp. L. & Econ., 728 (2021).

[41] *See* Lena Hornkohl, *A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds*, February 18, 2022, Kluwer Competition Law Blog, available at https://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/ (Last visited on July 2, 2024).

competitive conduct and co-operate with the investigating authority, in exchanged for reduced penalties.

The Organisation for Economic Co-operation and Development's ('OECD') Note on Challenges and Co-ordination of Leniency Programs asserts that "private claims are a deterrence and act as a disincentive for participants to come forward".[42] The authors believe these arguments to be ineffective as it is unjust to undermine consumer welfare because of the likelihood of deterring leniency. Both leniency programs and private enforcement are systems to facilitate and further the objectives of the competition law regime and it is the onus of the welfare state to keep trying for attainment of balance among the several systems.

Non-supporters also believe that courts may not function as efficiently especially with the load of follow-on cases[43] that come with private claims.[44] This belief is founded on the fact that private enforcement requires conduction of investigation before the CCI can make a decision thereby requiring extensive time and resources. The authors believe that such claims are also unfounded as the likelihood of inefficiency is an administrative fault and cannot be claimed as a downside of the private enforcement system. Inevitably, both public and private enforcement rely on the CCI to be effective.

Thus, any administrative inefficacy impacts both systems symmetrically. Mitigating such problems requires allocation of appropriate resources to the CCI and the establishment of stator

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[42] Organisation for Economic Co-operation and Development, *Challenges and Co-ordination of Leniency Programs — Background Note by the Secretariat*, No. 218, DAF/COMP/WP3(2018)1.

[43] For clarity, follow-on cases refer to claims that are brought after the finding of an infringement by the competition regulatory. 'Stand-alone' actions, on the other hand, are not contingent upon a decision by the regulator, but rather are based on a factual finding of infringement as an independent suit. This will be extensively discussed in Part V.C of the Paper where the authors argue for the including stand-alone claims under §53N of the Act, without the CCI/NCLAT recording a finding of infringement.

[44] Stephen B. Burbank et al., *Private Enforcement,* Vol. 17, Lewis & Clark L. Rev., 637, 662-667 (2013).

timelines within which investigations must be completed. However, as this paper will show, notwithstanding such challenges, the benefits of private enforcement mechanisms significantly outweigh any inefficiency concerns.

Private enforcement combined with a robust public enforcement system serve as great deterrence when compared to public enforcement alone.[45] The authors argue that the advantages of the system far outweigh the likely disadvantages, and private enforcement should not be taken as an optional setup but rather a necessity supported by the objectives of competition law regime.

IV. EVOLUTION OF PRIVATE ENFORCEMENT IN COMPETITION LAW AROUND THE WORLD

Given the unique socio-economic standings of states across the world, it is not surprising that different states have had different experiences with regards to private anti-trust litigation and have modelled their laws differently. In some jurisdictions, private enforcement has been a key component of the competition law system. In such systems, private enforcement is envisaged to play a complementary role to public enforcement.[46] This is true even as the principal purpose of competition law has been administrative, i.e., a tool for the State to intervene in markets to protect consumer interest against restrictive practices of firms.[47]

In this section, the authors examine the development of private enforcement mechanisms in three distinct jurisdictions — the U.S., EU and Australia. These three jurisdictions have been chosen for their advancement in the development and incorporation into

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[45] Kai Hüschelrath & Sebastian Peyer, *Public and Private Enforcement of Competition Law-A Differentiated Approach*, ZEW — CENTRE FOR EUROPEAN ECONOMIC RESEARCH DISCUSSION PAPER NO.13-029, 1, 10 (2013).

[46] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Relationship Between Public and Private Antitrust Enforcement*, June 11, 2015, DAF/COMP/WP3(2015)14, available at https://one.oecd.org/document/DAF/COMP/WP3(2015)14/en/pdf (Last visited on July 26, 2024).

[47] *Id*.

the practice of claims of anti-competitive conduct brought by private parties.

The U.S. policy is relevant from its emphasis on both deterrence and compensation, through the 'treble damages' mechanism.[48] The EU has seen steady growth of private enforcement across its Member States and attempts at harmonising its playing field by evolving a EU-wide framework, similar to the EU General Data Protection Regulations ('GDPR') or similar frameworks.[49] As such, it provides for a wider and more comprehensive basis of analysis, from the point of view of both evolution as well as harmonisation across wide ranging state practice.

More generally, EU law often has a profound impact on the development of policy across the world, particularly in the arena of competition and market regulation. Further, many of the world's largest businesses operate out of the US, EU, and Australia, and as such, an analysis focusing on these jurisdictions opens the economic implications lens as well.

More importantly, all these three jurisdictions have strong public enforcement mechanisms that allow for a unique perspective to study the role public institutions should play in a paradigm where private enforcement also parallelly thrives.

A. THE U.S.

In the U.S., private enforcement in anti-trust claims was included from the very beginning under §7 of the Sherman Act, 1890.[50] This was replaced by §4 of the Clayton Act, 1914.[51] This development provided for relief of three times the damages suffered to a private claimant.[52] It also stipulated that a final determination

[48] ICN, *supra* note 24.

[49] Pier Luigi Parcu, Giorgio Monti & Marco Botta, PRIVATE ENFORCEMENT OF EU COMPETITION LAW: THE IMPACT OF THE DAMAGES DIRECTIVE (Edward Elgar Publishing, 2018).

[50] The Sherman Antitrust Act, 1890, §7 (U.S.A.).

[51] The Clayton Act, 38 Stat.730, 15 U.S.C., 1914, §4 (U.S.A.) ('Clayton Act').

[52] *Id*.

could be made from previous government proceedings as they act as *prima facie* evidence for follow-on cases.[53] §16 of the Clayton Act also provided for injunctive relief to private claimants aggrieved as a result of anti-trust violations.[54] As of now, the private enforcement mechanism in the U.S. utilises treble damages,[55] class-action suits, exclusion of the passing on defence, among others.[56] The presence of these provisions themselves, however, did not lead to a substantial rise in antitrust litigation.

Significant legislative and jurisprudential changes took place in the U.S., with the U.S. Supreme Court ('SCOTUS') also broadly interpreting antitrust law provisions, making it easier for plaintiffs to establish their case.[57] Further, unlike their European counterparts, U.S. public enforcement agencies have never played a pivotal role in competition law enforcement.[58] Therefore, parties aggrieved by antitrust activity had little option but to move to Court to seek damages. The benefits of such changes, however, are not uniform and severe criticisms have been levelled against the SCOTUS' approach.

It has been widely expressed that there is widespread concern that damages actions, particularly in the 1960s and 1970s and in relation to class actions, became 'out of control.'[59] Such litigation was driven by private profit rather than public interest considerations,

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[53] *Id*.

[54] *Id*., §16.

[55] The treble damages remedy allows the successful plaintiff to recover three times the damage suffered as a result of the anti-competitive behaviour, *see* Berrisch et al., *E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law*, Vol. 24(3), Nw. J. Int'l L. & Bus., 592 (2004).

[56] Clayton Act, *supra* note 51, §4.

[57] *See* for eg., lower burden of proof for quantification of damages in Zenith Radio Corpn. v. Hazeltine Research Inc., 1969 SCC OnLine US SC 111 : 23 L Ed 2d 129 : 395 US 100 (1969); *See also* H. Hovenkamp, The Antitrust Enterprise: Principle and Execution, 1 (2005).

[58] Alison Jones, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US* in Harmonising EU Competition Litigation: The New Directive and Beyond (Bergström et al. eds., 2016).

[59] *Id*.

defeating the very purpose of private enforcement changes.[60] Quite often, claims were immediately settled by defendants wishing to avoid prolonged and expensive litigation expenses.

The U.S. tried to reverse the harm caused by its policy changes, especially the judiciary.[61] Procedural safeguards such as the reliability of expert testimony,[62] standards for class-action suits,[63] and evidential changes[64] were also incorporated to safeguard against exploitation of antitrust law. Scholarly opinion suggests that the policy might now again be too rigid.[65] The statistical impact of such safeguarding measures also strengthens such opinion.

B. EUROPEAN UNION

In Europe, similar to that of the U.S., cases of antitrust enforcement have historically been low.[66] However, the importance

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[60] *Id*.

[61] *See* Bell Atlantic Corpn. v. Twombly, 2007 SCC OnLine US SC 40 : 167 L Ed 2d 929 : 550 US 544 (2007) 557; *See also* Brunswick Corpn. v. Pueblo Bowl-O-Mat, Inc., 1977 SCC OnLine US SC 15 : 50 L Ed 2d 701 : 429 US 477 (1977) 489 (plaintiffs now had to demonstrate 'antitrust injury' — referring to an injury that antitrust laws are designed to protect).

[62] Blue Shield of Virginia v. McCready, 1982 SCC OnLine US SC 129 : 73 L Ed 2d 149 : 457 US 465 (1982).

[63] Hydrogen Peroxide Antitrust Litigation, In re, 552 F 3d 305 (3rd Cir 2008).

[64] Daubert v. Merrell Dow Pharmaceuticals, Inc., 1993 SCC OnLine US SC 104 : 125 L Ed 2d 469 : 509 US 579 (1993) (that evidence must be reliable and not ambiguous); *See* Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corpn., 1986 SCC OnLine US SC 61 : 89 L Ed 2d 538 : 475 US 574 (1986) (summary judgment should be granted in favour of the defendant where the plaintiff's assertion does not make economic sense).

[65] A.I. Gavil, *Designing Private Rights of Action for Competition Policy Systems: The Role of Interdependence and the Advantages of a Sequential Approach* in Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies (Philip Lowe & Mel Marquis eds., 2011).

[66] Denis Waelbroeck et al., European Commission, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, August 31, 2004, Comparative Report, available at https://competition-policy.ec.europa.eu/system/files/2021-04/damages_actions_claims_for_damages_infringements_study_comparative_report.pdf (Last visited on August 17, 2024); *See* Wells & Tomasic, *supra* note 29.

of the concept of private enforcement has been increasingly debated over the years and is recognised, at least in principle.

The decisions rendered in *Courage Ltd.* v. *Bernard Crehan* ('Courage') and *Vincenzo* v. *Manfredi* ('Manfredi') transformed the status of private enforcement in the EU from being an exception to a norm. In Courage, it was held that any individual possesses the right to claim damages as a result of conduct that distorts competition.[67]

Whereas in Manfredi, it was held that the damages would include both actual losses and also loss of profit.[68] These cases did not delve further into how causation and natural procedural rules would apply, resulting in the creation of the EU Damages Directive,[69] which introduced a number of plaintiff-friendly provisions intended to encourage more anti-trust filings.[70]

The E.U. and Australia attempted to mitigate the U.S. dilemma to a certain extent. They tried to leverage its strong public-centric enforcement system to bolster private enforcement. The European Commission's Green Paper on Damages Actions for Breach of the European Community Antitrust Rules, followed a study that concluded that Member States' antitrust laws were 'underdeveloped'.[71] This led to extensive consultations leading to a White Paper containing detailed proposals aimed towards establishing an efficient, effective and reliable system of private enforcement of competition law.[72]

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[67] Courage Ltd. v. Bernard Crehan, Case C-453/99, EU, (2001).

[68] Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, C-295/04, EU, (2006).

[69] E.U. Directive No. 2014/104/EU, *On Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union*, November 26, 2014, O. J. L. 349.

[70] The EU Damages Directive, and implications thereof have been examined in more detail in Part V.B of this Paper.

[71] Waelbroeck et al., *supra* note 66.

[72] EC White Paper, *supra* note 34.

As a guiding concept, the White Paper stressed the significance of maintaining a strong and efficient system of public enforcement and making sure that private activities support rather than undermine the steps taken by public competition authorities.[73] It further went on to make an interesting observation — aiming to promote a "truly European approach" to private enforcement by providing a "balanced solution to the current, frequently ineffective compensation systems in place, while avoiding over-incentives that could lead to litigation excesses as perceived in some countries outside of Europe".[74]

C. AUSTRALIA

Australia showcases an approach similar to that of Europe. In Australia, private statutory rights against breach of restrictive practices were recognised for the first time in 1974 (now called the Competition and Consumer Act, 2010).[75] Remedies such as single damages, injunctions and special divesture orders for mergers may be sought,[76] and class-action suits may also be filed provided procedural requirements are met.[77] Although Australia has lagged behind the U.S. and the E.U. in promoting private enforcement, significant developments have taken place since 2015.

In 2015, an independent panel was formed to review Australian competition policy, including private enforcement.[78] The Panel recognised that "private enforcement of competition laws is an

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[73] *Id*.

[74] *Id*.; *See also* European Commission, *Antitrust: Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches*, April 3, 2008, IP/08/515.

[75] Trade Practices Act, 1974 (Australia).

[76] Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws,* Vol. 34, Osgoode Hall Law Journal, 461 (1996).

[77] *See* Federal Court of Australia Act, 1976 (Australia).

[78] *See* Competition Policy Review Panel, *Competition Policy Review: Issues Paper* (April 14, 2014) 41; Competition Policy Review Panel, *Competition Policy Review: Draft Report* (September 2014) 254-9; Competition Policy Review Panel, *Competition Policy Review: Final Report* (March 2015) 407-18 ('Harper Review').

important right".[79] It recognised the presence of regulatory and practical impediments to the exercise of this right as well.[80] The focus of the Panel seems to be aligned more with the E.U. perspective, i.e., the aspect of deterrence *via* compensation alongside exemplary or treble damages.[81]

This is in opposition to the U.S. approach which emphasises more on deterrence through treble damages, which is likely linked with a relatively weak public enforcement mechanism. However, despite acknowledging the importance of private enforcement, Australia struggles with integrating private enforcement mechanisms in its existing framework.[82] Critical incidences of cartel conduct still exist, and the public enforcement system has been inadequate in ensuring compliance.[83]

Therefore, the need for competition law policy, including aspects of private enforcement, to be tailored to the peculiarities of the jurisdiction where implementation is sought, becomes crucial. This was the unique feature recognised in both E.U. and Australia antitrust policy. This idea is further explored in the later sections of this Paper.

V. INDIA AND ITS PRIVATE ENFORCEMENT REGIME

In this section, the paper aims to delve deeper into the existing mechanisms of enforcement of competition law in India. While doing this, the authors trace the statutory and judicial

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[79] Harper Review, *supra* note 78 at 416.

[80] *Id*.

[81] Caron Beaton-Wells, *Private Enforcement of Competition Law in Australia: Inching Forwards?*, 2016, available at https://www.researchgate.net/publication/306206332_Private_enforcement_of_competition_law_in_Australia_-_Inching_forwards (Last visited on January 6, 2022).

[82] Rebecca Gilsenan & Marcus Bezzi, *Balancing Public and Private Enforcement — An Australian Perspective*, January 2016, COMPETITION POLICY INTERNATIONAL, available at https://www.competitionpolicyinternational.com/wp-content/uploads/2016/01/M.Bezzi_.pdf (Last visited on January 7, 2022).

[83] *Id*.

development of competition law enforcement in the country with a specific emphasis on private enforcement mechanisms. As has been observed in the earlier parts of the paper, despite provisions for privately enforcing competition law in India, there has been gross underutilisation of the same. This section is thus crucial to understanding the unique dynamics of the Indian socio-economic structure, which ultimately helps us understand the need to reform the current framework in the country.

A. THE PRESENT LEGAL POSITION IN INDIA AND ITS EVOLUTION

1. Statutory Development & Objectives of Indian Competition Law

The Indian economy had traditionally been a closed economy, with the market majorly being under the control of the government, and disputes concerning competition in the market were regulated and dealt under the Monopolies and Restrictive Trade Practices Act, 1969.[84] With the advent of liberalisation and the new economic policy in the year 1991,[85] India witnessed a paradigm shift and the market was now made open for new private players as well. Liberalisation can lead to significant price rises and diminished advantages for the general economy if it is not accompanied with competition laws and policies aimed at regulating economic behaviour and institutions. Price liberalisation will not be effective if monopolistic draughts are permitted to continue existing unchecked. The privatisation of governmental monopolies is comparable.[86]

With the change introduced in the economic and trade policies, the market circumstances also changed and compelled the

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[84] Aditya Bhattacharjea, *Trade, Development and Competition Law: India and Canada Compared,* Vol. 5(1), Trade law and Development, 43 (2013).

[85] *Id*., Geeta Gouri & Kalyani Pandya, *The Indian Competition Law Experience – its History and its (Digital) Future*, Vol. 4(3), Indian Law Review (2020).

[86] Dr Jaswant Saini & Satish Kumar, *Impact of Competition Law on Inclusive Growth in India: A Legal Study*, Vol. 1(1), GIBS L. J., available at http://gitarattan.edu.in/wp-content/uploads/2020/02/Gibs-Law-journal-Vol.1-P1-Full-Paper.pdf (Last visited on August 12, 2024).

necessary change in law as well. Therefore, the existing Act, i.e., Monopolies and Restrictive Trade Practices Act, was considered no more suitable to deal with the market circumstances. This led to the passing of a new enactment in the year 2002, i.e., the Competition Act, 2002, to deal with various problems related to anti-competitive practices, ensuring and promoting fair and healthy competition in the market, etc.[87] The Act was drafted to suit the needs of the ever-changing economic scenario, adopting a global approach as well as addressing the concerns of the competition law regime in India.[88]

The Act was brought into force *inter alia* with the objective of curbing anti-competitive behaviour which causes appreciable adverse effect on competition in the Indian market, to ensure a fair competitive environment.[89] The aim of competition policy in the economy of a country is to ensure fair competition in the market by way of regulatory mechanisms. It is not planned to generate limitations or constrictions that may be lower to the growth of the society. Greater competition leads to an improvement in allocative efficiency by allowing more efficient firms to enter and gain market share at the expense of less efficient firms.[90] This is the Act's larger objective, as highlighted in the preamble.

The CCI is empowered to investigate anti-competitive agreements (both horizontal and vertical) and abuse by dominant firms under the Competition Act. An investigation can be initiated in one of three ways: (1) *suo moto* by the CCI;[91] (2) upon 'reference' from the government;[92] and (3) by way of an information memorandum (an

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[87] Eleanor M. Fox, *India: The Long Road to a Full-Function Competition Law*, Vol. 21, ANTITRUST, 72 (2007); Bhattacharjea, *supra* note 84.

[88] Competition Commission of India, *A Journey Through the Years (2009-2022)*, available at https://www.cci.gov.in/images/publications_booklet/en/journey1665050357.pdf (Last visited on August 12, 2024).

[89] The Competition Act, 2002, Recital 3 to the Statement of Objects and Reasons.

[90] World Bank, *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth,* 2017, available at https://openknowledge.worldbank.org/server/api/core/bitstreams/3e03cae3-0d24-5355-979f-87307aba6999/content (Last visited on August 12, 2024).

[91] The Competition Act, 2002, §§21A, 26.

[92] *Id*., §26.

'information') filed by a person (this includes third parties and public-spirited individuals, and as a result of leniency applications).[93]

Although one does not find any mention of consumer welfare in the Statement of Objects and Reasons of the Act, the preface to the Act unequivocally lays down its spirit by providing that it intends to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the market.[94] The private damages regime under the Indian competition law, which came into force in 2009, lays down the legislative foundation for consumers and competitors to sue for compensation in relation to the damages suffered as a result of the anti-competitive behaviour.

In keeping with this intent, the Act set up the CCI with powers to monitor anti-competitive behaviour taking place within the country as well as outside having an impact on the Indian markets.[95] §18 of the Act states that it shall be the duty of the CCI to protect the interests of consumers and ensure freedom of trade carried on by other market participants.[96] Yet, upon reading §27, one would find that the CCI itself has no explicit compensatory powers to remedy the loss suffered by consumers, or indeed any other market participant.[97]

Given the undeniable connection between competition policy and productivity and efficiency in an economy, how should such policy be regulated? Should the Indian perspective be purely to promote 'competition', or should competition policy be perceived as but a tool to generate more consumer welfare and economic efficiency?[98] Answering this question involves exploring the social goals that impact the interpretation of competition law principles. Inevitably, they will be dependent upon the institutional and political context of the

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[93] *Id*., §§19(a), 26.
[94] *Id*., Statement of Objects and Reasons.
[95] *Id*.
[96] *Id*., §8.
[97] *Id*., §27.
[98] Viswanath Pingali et al., *Competition Law in India: Perspectives,* Vol. 41(2), Vikalpa: The Journal for Decision Makers (2016).

country. The following section will examine India's goals in light of its developing economy priorities and characteristics.

The private damages regime is largely encased within Chapters VI and VIII-A of the Act.[99] The specific provision is §53N of the Act.[100] As per the provision under the Act, the NCLAT is empowered to award compensation to any person who has suffered damage or a loss as a result of the established contravention.[101] Post the recent amendment to the law, where the powers of the Competition Appellate Tribunal ('COMPAT') stand transferred to the NCLAT,[102] the latter now has original jurisdiction to hear applications from the Central or State Government or any person or enterprise who has suffered any loss or damage as a result of any contravention of §§3, 4, 5 and 6 of the Act, which has been established as a violation by the CCI or the COMPAT.[103]

Apart from the other provisions, the CCI (Lesser Penalty) Regulations, 2009, is a significant source for private enforcement claims against cartel groups.[104] After the enactment of these regulations, orders passed under the regime are unique since the parties expressly admit their involvement in the anti-competitive practices, leading to prompt adjudication of compensation claims and therefore, private enforcement of act comes into play.

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[99] The Competition Act, 2002, Chs. VI, VIII-A.

[100] *Id*., §53N.

[101] *Id*.

[102] Susmit Pushkar et al., *Compat No More: NCLAT Marches On*, Mondaq, June 5, 2017, available at https://www.mondaq.com/india/antitrust-eu-competition-/599508/compat-no-more-nclat-marches-on (Last visited on January 25, 2023).

[103] The Competition Act, 2002, §53N.

[104] The Competition Commission of India (Lesser Penalty) Regulations, 2009; Ram Kumar Poornachandran et al., *India: Cartels*, Global Competition Review, March 25, 2022, available at https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-cartels (Last visited on January 25, 2023).

B. JUDICIAL POSITION

The judicial development in the sphere of private enforcement of competition law in India has been extremely slow and scattered, oftentimes coming to a prolonged pause due to the lopsided structure of the framework. The *MCX Stock Exchange Ltd.* v. *National Stock Exchange of India Ltd.* ('MCX-SX') case is probably one of the best examples with respect to private enforcement and competition law in India.[105] Post-conviction of NSE for abuse of its dominant position, a claim for compensation was filed by the MCX.

Unsurprisingly, the matter is currently sub-judice the Supreme Court of India. The *Food Corpn. of India* v. *Excel Crop Care* case is another case which is likely to pave the way forward for private enforcement in India.[106] The order of this case is presently reserved, and it will be important to see how the NCLAT decrees upon the issue of private enforcement in this case. These cases will be discussed in more detail in Part IV of the Paper, below.

VI. IS THERE A NEED FOR PRIVATE ENFORCEMENT IN THE INDIAN COMPETITION PARADIGM?

As already observed, India has had a private enforcement mechanism in place, albeit very primitive. Despite this, it has been grossly underutilised. This takes us to answer a significant question of whether India even needs a refined system for private enforcement. In this section, the authors attempt to answer this question in a three-pronged manner. Given the objectives enshrined in the competition law and policy in India, this Part focuses *first*, on the unique characteristics of the Indian socio-economic setup and tries to reconcile the objectives of competition law with India's position as an economically developing country. *Second,* it tries to connect the dots to help answer the reason behind the underutilisation of the private

[105] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., 2011 SCC OnLine CCI 52.

[106] UPL Ltd. v. Food Corpn. Of India, Civil Appeal No. 3432/2020 (Supreme Court of India) (Unreported).

enforcement regime. *Third*, it argues how a robust framework for private enforcement of competition law in India will help it achieve its regulatory objectives.

A. RECONCILING THE OBJECTIVES OF THE INDIAN COMPETITION LAW REGIME AS AN ECONOMICALLY DEVELOPING COUNTRY

The main objective of the law is to encourage healthy competition in trade and business and help stop unscrupulous business activities that, in most cases, are aimed at cheating the consumers and controlling markets through means — fair or foul.[107] Infringement of competition law affects public interest as it has direct repercussions on both structural and proper functioning of market economy and consequently on the economic activity of all operators and participants in it.[108] However, with the rise in anti-competitive agreements and exclusive arrangements entered between parties, the need to protect the private rights of the parties assumes significance in today's times.

Competition policy seeks to prevent restrictive business practices and market structures that significantly lessen competition. The objective of such policy is to maintain and encourage competition in order to foster greater efficiency in resource allocation and maximise consumer welfare. These objectives are achieved through an interface with other economic policies affecting competition in local and national markets. The related regulatory policies include those relating infrastructure, international trade, foreign direct investment, intellectual property rights, financial markets etc.[109]

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[107] Centre for Competition, Investment & Economic Regulation, *Competition Law to Relieve Consumers of Unhealthy Business Practice: Shafique*, available at https://cuts-ccier.org/competition-law-to-relieve-consumers-of-unhealthy-business-practice-shafique/ (Last visited on January 15, 2023).

[108] Office of Fair Trading, *Government in Markets: Why Competition Matters — A Guide for Policy Matters*, 2009, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284451/OFT1113.pdf (Last visited on January 13, 2023).

[109] Rakesh Basant & Sebastian, Morris, *Competition Policy in India: Issues for a Globalising Economy*, Vol. 35(31), E.P.W, 2735 (2000).

It is sensible to acknowledge at the outset that states will adopt and apply competition laws that are suited to their particular circumstances: there is no 'one size fits all' to competition policy. In particular, competition laws and policies developed in jurisdictions such as the U.S. and the EU may require adaptation when applied in developing countries; indeed, they may be quite inappropriate.[110] To strike a balance between the twin objectives, India would need to consider its position as a developing country in the midst of international regulations often introduced and enforced by developed nations. These nations have in the past introduced tariff barriers to protect their infant industries and have exploited labour both within and in colonised nations to build the industrial base for their level of development. They now seek to impose "free-trade" policies by virtue of WTO competition law policies on poorer countries,[111] with an obvious intention to forcefully open up their markets and, in the long-term, hampering their export productivity and potential.[112]

Often for developing economies such as India, economic growth *per se* is not sufficient unless the prospects of the growth are able to 'trickle-down' to the poor to alleviate poverty. In other words, developing economies focus on comprehensive economic development which forms the basis of their competition policy. It is important in this connection to note that anti-competitive behaviour is not limited to large firms. Comprehensive implementation of competition law forces even the smallest entrepreneurs to refrain

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[110] Heba Shahein, *Designing Competition Laws in New Jurisdictions: Three Models to Follow* in New Competition Jurisdictions: Shaping Policies and Building Institutions (Richard Whish & Christopher Townley eds., 2012); Michael S. Gal et al., The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law (Edward Elgar, 2015); Tembinkosi Bonakele et al., Competition Policy for the New Era: Insights from the BRICS Countries (Oxford University Press, 2017); Ariel Ezrachi, *Sponge*, Vol. 5(1), Journal of Antitrust Enforcement, 49 (2016); Thomas K. Cheng, Competition Law in Developing Countries (Oxford University Press, 2020).

[111] Keith E. Maskus & Mohamed Lahouel, *Competition Policy and Intellectual Property Rights in Developing Countries*, Vol. 23(4), The World Economy, 599 (2000).

[112] Aditya Bhattacharjea, *Competition Policy: India and the WTO*, Vol. 36(51), E.P.W., 4710 (2001).

from engaging in anticompetitive conduct. This gives more individuals a stake in the productive assets of the country. In electoral democracies, citizens can only occasionally express their political opinions through the ballot box.

By contrast, economic democracy, made real through competition law enforcement, is a continuous process.[113] Developing nations are characterised by a greater incidence of poverty, with which often occurs a lower purchasing power compared to developed nations. The special economic characteristics of developing countries include small and uncompetitive markets, missing institutions, prevalence of market failure, poorly developed financial markets, high barriers to entrepreneurship, heavy state presence, widespread corruption and state capture, prevalence of the informal sector, and domination by large business groups. These may necessitate some adjustments, either by shifting enforcement priorities or refining the analytical framework for specific business practices.[114]

Linkages between firm-level innovation and economy have been established, recognising the importance of competition for productivity and growth. The role of well-functioning markets in achieving development goals has been recognised in the development literature as well. When government policies limit competition, more efficient companies cannot replace less efficient ones. The economic growth slows and nations remain poor.[115] Given such linkage, can competition law enforcement in India adopt some bright line rules for applying the law? Should competition law be seen as squarely di-

[113] Taimoon Stewart et al., *Competition Law in Action, Experiences from Developing Countries* (2007).

[114] Thomas Cheng, *Why Competition Law is so Important for Developing Countries*, Promarket, July 14, 2020, available at https://www.promarket.org/2020/07/14/why-competition-law-is-so-important-for-developing-countries/ (Last visited on August 12, 2024).

[115] W.W. Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability, 103 (University of Chicago Press, 2004); Federal Trade Commission, *National Champions: I Don't Even Think it Sounds Good*, March 26, 2007, available at https://www.ftc.gov/news-events/news/speeches/national-champions-i-dont-even-think-it-sounds-good (Last visited on August 12, 2024).

rected to the protection of the competitive process or should the protection of competition be viewed as an instrument in order to achieve 'consumer welfare' and economic efficiency?[116]

Having established this, it is fair to say that adopting an 'economic approach' to the application of competition law provides a reasonably sound and competent framework for generating consumer welfare and economic efficiency.[117] The Supreme Court of India emphasised the pursuit of efficiency as the objective of the Indian Competition law tracing its history. In the opening paragraphs of *CCI* v. *SAIL* ('SAIL') —

> "The earlier Monopolies and Restrictive Trade Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law. […] The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law."[118]

Therefore, greater competition implying lower prices is a desirable outcome for consumers in such nations. Further, even on the other side of the market chain, the small producers in developing nations are likely to benefit from greater competition — greater competition implies more retailers, and therefore, more competitive prices at which these producers can sell to firms.[119]

Again, developing nations are not monoliths, i.e., there is a considerable degree of difference between, say, the competition regime in India versus that in Uganda. While many nations often

[116] Pingali et al., *supra* note 98.
[117] *Id*.
[118] CCI v. SAIL, (2010) 10 SCC 744.
[119] Cheng, *supra* note 110.

struggle with intrinsic problems in the market system, corrupt public institutions, and poor public enforcement mechanisms, India's problems are more focused on its development strategy as it does have functioning public institutions dealing with antitrust contraventions. A more parallel case in point would be South Africa, which has fairly well-functioning judicial bodies and administration. It suffers from a similar problem as India — very few private compensation claims have been filed, and that too only by well-established corporates. No claims have been filed by "poor victims" of anti-competitive practices. Therefore, the larger aim of ensuring trickle-down efficiency by the compensation regime does not end up working.[120]

Interestingly, in the SAIL decision, the Supreme Court also took inspiration from the competition legislations in the U.S. and the United Kingdom, owing to the similarity of the "legislative scheme and intent".[121] It is possible that the Court in the future may take assistance from comparable legislation in order to decide contentious matters. However, this would need considerable caution, given that competition policy in India is also modelled around its developing status.

It is significant to note what the objective of 'consumer welfare' itself means. For many authorities, competition law seeks to protect the process of free market competition in order to ensure the efficient allocation of scarce economic resources. This school of thought rests attempts to utilise competition policy to attain perfect competition. This is followed by a fundamental economic assumption that perfect competition leads to an overall "bigger pie", i.e., a bigger share for all stakeholders involved, producers and consumers alike.[122] On the other hand, some authorities argue that the maximisation of economic efficiency will ultimately create benefits for the consumer,

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[120] Frederic Jenny, *Can Competition Law and Policy be Made Relevant for Inclusive Growth of Developing Countries?*, Vol. 65(1), The Antitrust Bulletin, 166 (2020).

[121] CCI v. SAIL, (2010) 10 SCC 744.

[122] Richard Whish & David Bailey, Competition Law (Oxford University Press, 10th edn., 2021).

including i) price and cost reductions, plus improvements and innovations in ii) quality; iii) choice; and iv) services.[123]

For a developing country-centric model, it is best if policy focuses one that is neither too interventionist, and one that does not openly let *laissez faire* harm smaller firms and consumers. A "pro-poor" framework[124] should focus on private actions and class actions to allow recourse to the competition framework even at the individual firm level. Further, from an institutional perspective, a private-public complementary system, as explained above, should feature in the legal regulatory environment.[125]

The need of the hour is not restricted to creating awareness by punishing the entities involved in anti-competitive activity or abusing their dominant position in the market but to make good the losses to the injured party.

VII. DELVING INTO THE 'WHY' OF THE UNDERUTILISATION OF INDIA'S PRIVATE ENFORCEMENT REGIME

Notwithstanding the existence of provisions in the Competition Act allowing for private enforcement of competition law, the mechanism is still in its infancy. This is visible by the fact that there has been no single decided case in this domain. There have been only seven cases proceeded to date, all of which are awaiting a final decision. While the lack of decided cases does not imply that the privacy enforcement mechanism is nascent *per se*, the authors will demonstrate that the structure of §53N itself is such that such claims are deterred in the first place.

One of the major reasons for the underutilisation of the existing framework is attributed to how the act itself is structured. A simple reading of §53N shows that compensation claims can only be

[123] Symposium, *10th Annual ICN Conference* (The Hague, 2010-11) ('ICN Discussion').
[124] Jenny, *supra* note 120, 164-172.
[125] *Id*.

adjudicated on the basis of findings of 'the Commission' or an order from 'the Appellate Tribunal' in an appeal against any order of the Commission.[126] Thus, the private litigation regime makes it mandatory that any claim can only arise after a finding of the violation of the substantive provisions of the Act has been established by the regulator or the appellate authority. In the MCX-SX Case,[127] presently in appeal, the petitioner could file for compensation under §53N only after contravention had been established by the CCI and COMPAT.

There are more fundamental problems with §53N, which potentially prevent aggrieved parties from filing compensation claims. Naturally, an enterprise would choose to file for compensation only when it can predict, with a certain degree of surety, that the damages received would sufficiently cover the costs of pursuing the litigation in the first place.

Even in the limited cases where §53N applications have been filed, pendency of cases has proved to be a major deterrent. As explained previously, the NCLAT's decision under the Competition Act is appealable before the Supreme Court. Thus, even as both the CCI and COMPAT (now merged with NCLAT) found the NSE to be guilty for abusing its dominant position in MCX-SX, compensation cannot be awarded till this decision reaches finality.[128] Thus, the application under §53N as filed by MCX cannot be determined till the Supreme Court renders its decision. Similarly, in *Sai Wardha Power Co. Ltd.* v. *Coal India Ltd.*, Sai Wardha filed an application under §53N in 2015. However, again, this application cannot be decided till finality is achieved as to contravention of the Competition Act by Coal India. In 2016, the erstwhile COMPAT upheld the CCI's determination of abuse of dominant position by Coal India.[129] Coal India

[126] The Competition Act, 2002, §53N; *See* Balani, *supra* note 8, 2298.

[127] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., 2011 SCC OnLine CCI 52.

[128] Akansha Mehta, *India – Competition Appellate Tribunal on Determination of Relevant Product Market*, Kluwer Competition Law Blog, March 3, 2015, available at https://competitionlawblog.kluwercompetitionlaw.com/2015/03/03/india-competition-appellate-tribunal-on-determination-of-relevant-product-market/ (Last visited on May 21, 2024).

[129] Coal India Ltd. v. CCI, 2016 SCC OnLine Comp AT 511, ¶37.

appealed the decision before the Supreme Court, owing to which the NCLAT is unable to decide on the §53N application till the Supreme Court decides on main appeal in favour of Sai Wardha.[130] A similar situation also exists with *Maharashtra State Power Generation Co. Ltd*. v. *Nair Coal Services (P) Ltd*.

In *Food Corpn. of India* v. *Excel Corp Care Ltd.*, the §53N application was admitted by the NCLAT post a final decision of the Supreme Court on the merits of the violation in 2017. However, the 2020 NCLT order only answered the question on limitation, and the main merits of the compensation application are still pending as of writing.[131] Similarly, both *Wasan Exports (P) Ltd.* v. *Canara Bank* and *Satyendra Singh* v. *Ghaziabad Development Authority*, are at nascent stages of admission or have been stretched on procedural questions and such grounds.

Under the Act, the plaintiff is entitled to damages "shown to have been suffered". In some cases, such losses are easily proved. Take for example, a price-fixing cartel, where the compensation claim arises out of an overcharge.[132] The loss arising therefrom may easily be demonstrated. However, there are circumstances where calculation of such losses is difficult. Unlike the system in the U.S., it is unclear as to the degree of proof that is required for a claim to be considered under the Indian competition law system.

As argued above, the U.S. pushed for reforms at both the legislative and judicial levels to facilitate the filing of compensation applications. Such reforms included recovery of attorney's fees as well, re-assuring firms that they will be sufficiently 'compensated' for the losses suffered.[133] The lack of such arrangements and re-assurances feeds anxiety of firms.[134] This could be part of the explanation for DLF withdrawing its compensation claim in 2010.[135] Therefore,

[130] Coal India Ltd. v. CCI, 2022 SCC OnLine NCLAT 3098.
[131] Food Corpn. of India v. Excel Corp Care Ltd., 2020 SCC OnLine NCLAT 1027.
[132] Balani, *supra* note 8.
[133] Diego A. Zambrano et al., *Private Enforcement in the States*, Vol. 172(61), U. Pa. L. Rev., 94 (2023).
[134] *Id*.
[135] Belaire Owner's Assn. v. DLF Ltd., 2011 SCC OnLine CCI 89.

this necessity of proving the extent of damages suffered by the plaintiff from the anti-competitive conduct has made it difficult for the litigants to approach the NCLAT for compensatory remedy.[136]

An interesting way of looking at the issue at hand is how the position under the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP') was more consumer welfare-centric than the position under the Competition Act, 2002. The position under the MRTP regime was that it did not require the decision of an enquiry, a condition precedent to the maintainability of an application under the erstwhile §12B,[137] and the *locus standi* of applicants to bring in such applications.[138] The same provision was retained in the form of §34 (unnotified) in the Competition Act, 2002. However, it could not come into force and was ultimately repealed by the Competition (Amendment) Act, 2007.[139] Unlike §34 or §12B, §53N requires a finding of contravention by the CCI for a compensation suit to be maintainable, i.e., filing of independent proceedings is no longer permissible.

Every application for compensation must be accompanied by a CCI or NCLAT finding, as mandated by §53N(2).[140] Further, the nature of the MRTP Act allowed for the applicant to actively take part in the complaint by way of producing evidence, witnesses, making applications for discovery of documents, etc.[141] Under the new regime, however, §26 does not allow for such involvement since an adversarial process is established under the DG. This 'inquisitorial nature' of the CCI's powers was affirmed by the Supreme Court in *CCI*

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[136] Balani, *supra* note 8.

[137] Monopolies and Restrictive Trade Practices Act, 1969, §12B. To be contrasted with the Competition Act, 2002, §53N.

[138] Shaligram v. Remul Public School, Compensation Application No. 1317 of 1988, ¶¶6,7,8.

[139] The Competition (Amendment) Act, 2007.

[140] The Competition Act, 2002, §53N(2).

[141] Sankalp Jain, *Law of Compensation under Indian Competition/Antitrust Laws: Evolution, Legislative Framework and Scope*, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677100 (Last visited on January 25, 2023).

v. *SAIL*, wherein the applicant has a very limited role to play.[142] This is perhaps another reason why the provisions under the Competition Act remain underutilised.

Further, a parallel could be drawn with Europe, which saw a very slow growth in its private enforcement regime in the initial years. A general lack of awareness of the concept of private enforcement, particularly due to the presence of a centralised body for public enforcement, was regarded as a primary reason for low applications.[143] This holds true for India as well, where competition law policy has been it its nascent stages.[144]

Apart from the aforementioned reasons, it is not unarguable that the prevalent lack of awareness of competition law as a developing field,[145] is a significant reason for poor utilisation of the private enforcement regime. The Commission faces challenges with regard to lack of awareness amongst all important stakeholders about the newer methods of implementing the law.[146]

VIII. HOW A ROBUST LEGAL FRAMEWORK FOR PRIVATE ENFORCEMENT OF COMPETITION LAW WILL HELP INDIA FULFILL ITS OBJECTIVES?

The litigation system in each jurisdiction, to some extent, reflects the respective perceptions of what private rights should protect. The Indian market is a unique blend of mixed economy, where private sector and public sector undertakings participate together in harmony.[147] In addition to this, there are certain areas and sectors which are opened to foreign direct investment. In contemplating the

[142] CCI v. SAIL, (2010) 10 SCC 744.
[143] Waelbroeck et al., *supra* note 66.
[144] Pingali et al., *supra* note 98.
[145] S. Gupta, *Competition Law in India and Its Development*, Vol. 3, International Journal of Law Management & Humanities, 1 (2020); Sandeep Saini & Chinky Nanda, *Competition Advocacy: An Analysis of Provisions under Competition Law of India,* Vol. 4(2), International Journal of Law Management & Humanities, 2045 (2021).
[146] Pingali et al, *supra* note 98.
[147] Stewart et al., *supra* note 113.

design of competition policy in a developing country, the first question to be answered is whether a policy that aims to maximise competition with competition law enforcement will deliver economic growth and meet the development needs of a developing country.

Infringement of competition law affects public interest as it has direct repercussions on both the structural as well as proper functioning of market economy, and consequently on economic activity of all operators and participants in it. Competition law enforcement is a proven mechanism for encouraging the emergence of strong firms. It facilitates the entry of new firms, some of which may prove exceptionally efficient and profitable, encourages failing, low-productivity ones to leave the market and, by disciplining monopolistic behaviour, encourages innovation.[148]

It may thus be argued that promoting consumer welfare is inherent in the enforcement of competition and that consumer welfare is a natural result of (optimally implemented) competition law.[149] Private enforcement has perhaps the most direct impact on public enforcement.[150] It may act as a 'deterrent', by making the offence itself as unprofitable for the infringer, thereby reducing the possibility of the violation. Deterrence, in the competition policy sphere, is the effectiveness of a sanction that dissuades a potential offender from committing a certain act.[151]

It is heavily dependent upon two factors: (1) the severity of the sanction; and (2) the likelihood of being apprehended. This implies that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable.[152]

[148] *Id*.

[149] ICN Discussion, *supra* note 123.

[150] Thomas M.J. Möllers & Andreas Heinemann, *The Enforcement of Competition Law: A Comparative Perspective* in The Enforcement of Competition Law in Europe, 431 (Cambridge University Press, 2007).

[151] P.H. Rosochowicz, *Deterrence and the Relationship between Public and Private Enforcement of Competition Law*, Amsterdam Centre for Law & Economics Working Paper Series (2004).

[152] G. Becker & G. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, Vol. 3(1), 3 J. Legal Stud., 1 (1974).

Several infringing companies may take a regulatory arbitrage while committing actions which may fall foul of the Act, with the intention of driving competition out of the market or creating entry barriers, thus affecting competition. In such a case, such companies may later be found to be in violation of the Act and consequently, may be penalised.

But why is private enforcement, in particular, relevant in this context, especially when deterrence can be ensured simply by strengthening public enforcement and institutions? This is because owing to the anti-competitive conduct of the offending firm, the competitor(s) would have exited the market or driven to a point of no relevance by that time. In such a case, in addition to paying penalty, if the infringing companies is mandated to pay hefty compensation to the persons who are affected, directly or indirectly, by the behaviour of the infringing company, it becomes likely that the actions of the infringing company become unprofitable.

A fear that crept in when the prospect of private enforcement litigation in Europe was being contemplated was that the process would be taken over by private parties. Earlier, government and administrative bodies (CCI equivalent) had played a substantial role in the process and evolution of competition law enforcement. It was feared that enforcement suits would no longer be filed in the public interest but in private interests.[153] This is unlikely to be the case for India since a claim/suit under §53N can be maintained only when a contravention order has been decreed by the CCI. Only when a practice of a party has been found to be "anti-competitive," can a private party opt for private enforcement and damages. Therefore, the centrality of public institutions is maintained in Indian antitrust policy.

When it comes to considering the costs of enforcement, the use of §53N will only take place if firms think that the compensation they can derive would be greater than the cost of bringing the suit itself. Rational private enforcers would only act in cases where the reward available was greater than the costs of enforcement. The fine or damages recovered by private enforcers would, in many

[153] Möllers & Heinamann, *supra* note 150.

cases, be limited by the net worth of the defendant. In cases with high enforcement costs and/or defendants with low net worth, it would not be rational for potential private enforcers of the law to engage in that activity.[154] The focus needs to be on the complementary role that private and public enforcement can play. Private enforcement will be of most value in those cases in which the rewards available are greater than their enforcement costs.[155] Therefore, it should be in the competition authorities' best interest to support applicants in these matters.

Public enforcement is most necessary when the fine or damages that may be exacted from a wrongdoer are much less than the costs of enforcement. It may play a complementary regulatory function in the achievement of certain substantive goals even when governmental enforcement is fairly powerful.[156] The extent to which this state of affairs is desirable has been legitimately questioned by academics in recent years, particularly when private litigation may lead to double punishment of specific actors or when private parties may experience informational disadvantages compared to public regulatory bodies.[157]

By providing information access and proper protection to applicants for leniency, public institutions can play a significant role in the private enforcement of competition cases.[158] Such

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[154] "Under private enforcement, firms are willing to invest in enforcement only if they at least break-even — their fine revenue must be at least as large as their enforcement costs. Under public enforcement, however, the optimal solution may result in fine revenue which is less than enforcement costs". *See* A.M. Polinsky, *Private Versus Public Enforcement of Fines*, Vol. 9, J. Legal Stud., 105 at 107 (1980).

[155] *See* A.M. Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, Vol. 74, Geo. L. J., 1234 (1986).

[156] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, Vol. 53(4), WM. & MARY L. REV., 1137 (2012); Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, Vol. 34, Osgoode Hall Law Journal, 461 (1996).

[157] *Id*.; Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, Vol. 158(7), U. Pa. L. Rev., 2173, 2176 (2010).

[158] K. Moodaliyar et al., *The Relationship Between Public and Private Enforcement in Competition Law: A Comparative Analysis of South African, the European Union and Swiss Law,* Vol. 137, The South African law Journal (2020).

protection could function as limiting the potential damages that the leniency applicant may have to pay in any follow-on actions that are brought against it. Relatively, this would still imply that for a firm engaging in cartel or anti-competitive conduct,[159] it will be beneficial to opt-in to the leniency program, even as private enforcement exists. This will protect the leniency process and ensure the effectiveness of this policy.[160]

IX. DESIGNING A MODEL FRAMEWORK FOR FACILITATING PRIVATE ENFORCEMENT IN INDIAN COMPETITION LAW REGIME

Having established that a strengthened mechanism for privately enforcing competition law in India is needed for India to achieve its several objectives under the competition law regime, the paper now moves to discuss how such a framework can be achieved. In this section, the authors discuss some concepts, that they believe are the most important to be reformed at the earliest. Though several countries of the world, such as the US and the UK, have well-structured laws pertaining to private enforcement of competition law, for any such law to be brought to India, it has to adapt to the unique socio-economic climate of India. In this section, the authors have identified some broad concepts that may be incorporated by the policy-makers into the current framework.

A. REFORM THE EXISTING COMMITMENTS MECHANISM

India introduced the commitments mechanism in the Competition (Amendment) Act, 2023, which allows potential violators of the Competition Act to settle with the CCI by proposing structural and behavioural remedies to potential anti-competitive conduct.[161] These mechanisms are stated to bring about efficiency gains while remedying market distortions. Commitment mechanism enables entities that are being investigated for antitrust liability to agree with the regulators on implementing behavioural or structural remedies

[159] *Id*.; *See* Hornkohl, *supra* note 41.
[160] *Id*.
[161] The Competition (Amendment) Act, 2023, §48B.

that may alleviate the antitrust concern, in return of cessation of investigation against them.

This is purported to bring efficiency benefits to antitrust regulators and potential defaulters alike—while also helping potential defaulters avoid a hefty fine for their conduct. Formally, the mechanism was introduced by the proposed addition of §48B of the Competition Act.[162] It empowered any party against whom an inquiry has been initiated under §26(1) of the Act for a contravention of §4 or §3(4) of the Act to propose commitments to the CCI. A party may offer commitments between the duration of the order of inquiry by the CCI under §26(1) and any time prior to the receipt of the DG report. The Commission may take into account the nature, gravity and impact of alleged contravention and the effectiveness of proposed commitments in arriving at a final decision on this.[163]

Apart from the claims of creating 'shadow jurisprudence', there are two extremely significant elements to the Section that merit more attention. The Section imposes a duty upon the CCI to provide an opportunity of hearing to the applicant, the DG or "any other party".[164] Further, no appeal under §53B could lie against a commitments decision passed by the Commission. In addition to the Act, the CCI also offers further guidance on the commitments procedure through the draft Commitments Regulations ('Draft Regulations').[165] The Draft Regulations clarify the procedure for adopting commitment decisions, which recognises the right of third-party representations to the CCI. They also recognise the fact that an adoption of commitments decision will not be construed as a finding of contravention under the Act.

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[162] *Id*.

[163] Shashank Mehrotra, *Commitments: Shutting the Doors to Private Enforcement?*, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY, December 12, 2023, available at https://lawschoolpolicyreview.com/2023/12/12/commitments-shutting-the-doors-to-private-enforcement/#:~:text=Such%20accommodation%20is%20seen%20in,compensation%20to%20such%20third%20parties (Last visited on July 26, 2024).

[164] The Competition (Amendment) Act, 2023.

[165] The Competition Commission of India (Commitment) Regulations, 2023.

The problem arises when these provisions are read with §53N of the Act. The right to privately enforce under §53N arises only after the decision of the Commission or Tribunal has been rendered. According to this provision, any application for compensation must include the findings of the Commission. The explanation to the section further clarifies that the claim is sustainable only after the Appellate Body has noted in its decision the violation of the Act. In conjunction with this, an order agreeing to a commitments decision will not be construed as a commitment decision.[166] All commitment decisions adopted in India, therefore, would immediately shut all doors to any claims for damages under §53N.

One may still look at the Draft Regulations to see the possibility of private claims being accommodated in the Commitments decisions. The Draft Regulations acknowledge third-party representations to the CCI as an example of this accommodation.[167] Nevertheless, the Regulations do not contain any mechanism that could allow for or require the committing party to compensate these third parties.

The CCI's first consideration when adopting a commitments decision is whether a claimed violation is significant enough in terms of its 'nature, gravity, and impact' to justify a fine.[168] It would forgo a probe and make a commitment decision if it decided that the behaviour was not substantial enough. Nevertheless, in these cases, the private parties who might have suffered because of the potentially anti-competitive behaviour that was resolved through promises would bear the direct implications of the CCI's decision.

In the proposed Commitments regulation and regime under the Act, while theoretically it may be possible for an aggrieved party to make representations to the CCI highlighting the damages they have suffered as a result of abusive conduct, multiple problems would arise in such a scenario.

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[166] *Id*., Regn. 6(1).
[167] *Id*., Regn. 5(1).
[168] Mehrotra, *supra* note 163.

First, the CCI does not have the required information at the stage of commitments to assess the validity of such claims. This is because the DG Report is essential for the CCI to understand the seriousness of the alleged conduct in the first place, and any assessment of the same in the absence of a DG report invites significant scrutiny. While under the Draft Regulations, the committing party has to submit its own report on the prospective effectiveness of the commitment and how it remedies alleged anti-competitive conduct, such a representation may obviously not represent the accurate picture.

Second, without the DG report, the aggrieved themselves may not have the wherewithal to prove such a damage in the first place. This is especially important considering the highly nuanced and specialised nature of competition law, requiring claimants to present market studies and economic models to prove damages. Third, these parties do not enjoy any special legal standing to pressure the CCI into adopting a full-decision, so they would not be heard at all.[169] This criticism has been levied in Europe as well.[170]

In order to rectify such a problem, reference can be made to the EU Directive on damages, and to accommodate the same, it states that anti-competitive conduct in the form of cartels may be presumed to result in harm to stakeholders in the market, entitling them to damages.[171] Further, placing a high burden on plaintiffs at the initial stage to prove harm caused must be avoided to prevent genuine cases being discouraged. A key motivator for parties to enter into commitment decisions is to avoid potential penalties for anti-competitive conduct.

Experience in Europe has largely been reflective of the same,[172] where in multiple decisions such as commitment deci-

[169] *Id*.

[170] Dorin Rat, *Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?*, Vol. 38 (4), World Competition Law and Economics Review (2015).

[171] *Id*.

[172] Ryan Stones, *Commitment Decisions in EU Competition Enforcement: Policy Effectiveness* v. *the Formal Rule of Law*, Vol. 38, Yearbook of European Law (2019).

sions have led to situations which may be categorised as instances of 'enforcement below the competition law', effectively letting anti-competitive conduct go unpunished but remedied in the form of behavioural commitments. Private compensation may be agreed to as part of the larger commitments package. This would ensure that a violation on the part of the committing party must be considered a violation of the commitments agreement itself, mandating the CCI to reopen its investigation.

Further, a voluntary compensation mechanism to remedy consumers for damages may be considered. However, while it may be contended that a compensation plan is useful when the losses suffered by consumers and other affected parties can be measured in monetary terms, it is proposed that even in cases where damages are not specified in monetary terms, remedies can be provided by establishing a Competition Rehabilitation Fund for enhancing the competition environment in India, which would indirectly compensate the consumers.

Incorporating such a scheme would bring India's commitment framework on par with international standards such as those seen in South Korea's Consent decree; for example, in the consent decrees of Naver and Daum enterprises in South Korea, the companies established a non-profit foundation worth $95.7 million to assist consumers who had suffered financial losses as a result of the company's biased advertising.[173] Furthermore, money would be provided for consumer education, to raise awareness, and protect online consumers and small internet businesses. A similar remedy was also adopted in the SAP consent decree instance.[174] The incorporation of such changes will make India's commitment framework more consumer-centric,

[173] *Naver, Daum Fix Own Punishment*, Korea JoongAng Daily, January 1, 2014, available at https://koreajoongangdaily.joins.com/2014/01/01/industry/Naver-Daum-fix-own-punishment/2982890.html (Last visited on July 29, 2024).

[174] In-House Community, *Recent Examples of Consent Decrees in Korea and Their Implications*, October 14, 2016, available at https://www.inhousecommunity.com/article/recent-examples-of-consent-decrees-in-korea-and-their-implications/ (Last visited on July 29, 2024).

upholding the spirit of Indian competition law, and effectively minimising private action damages or private enforcement.

B. LOCUS STANDI- WHO CAN BRING A PRIVATE ACTION CLAIM?

The damage or loss would be incurred by an indirect customer as a consequence of the infringing behaviour since the direct customer "passed-on" the damage or loss to the indirect customer.[175] The "passing-on" defence is, therefore specifically intended to ensure that the real individual who has experienced the damage or loss has the right to make a claim and that the person or organisation that has passed on the loss or damage does not overcompensate.

An amended regime may explicitly recognise the passing-on of overcharges under § 53N of the Act and any other equivalent provision enacted for stand-alone actions, which would be consistent with the CCI's interest in protecting consumers as stated in §18 of the Act, as well as accomplish the purpose of allowing for representative suits under §53N. It is to be noted that the §53N is couched in very wide terms and allows "any enterprise or person" to make a claim.[176]

A textual interpretation would imply that even indirect consumers be covered within the ambit of possible claimants in a private enforcement action. However, given the lack of jurisprudence, it is unclear what the scope of affected persons under §53N may include. It is thus proposed that India adopt a presumption of passing-on overcharges to indirect customers in cases where the product subject to the overcharge was acquired by them, or another product that contained or was deduced from such product was purchased by them, in line with the position in this regard within the European Union.

The Damages Directive in the EU helps the competition authorities determine the compensation that needs to be given

[175] Avaantika Kakkar & Anshuman Sakle, *India* in The Private Competition Enforcement Review, 114 (Ilene Knable Gotts & Kevin S. Schwartz eds., Law Business Research Limited, 13th edn., 2020).

[176] The Competition Act, 2002, §53N(1).

to the end-customer, i.e., how much damage has been 'passed-on'. In simple terms, the indirect customer shall be able to claim damages once it is proven that the damage is passed on.[177] Here, the principle with respect to the right to claim compensation is that there should be a "causal relationship" between the loss and the anti-competitive behaviour.[178] In the EU, the defence of passing on is permitted under Article 12, which mandates EU member states to lay down rules such that claimants are not overcompensated.[179] The right to compensation is now further expanded to 'umbrella claims'.[180] Umbrella effects are those effects that take place as a result of actions of a market actor that causes the price to rise across the sector concerned.[181]

This is in contrast to the position in the US where the indirectly affected parties are disadvantaged from claiming compensation.[182] The US Supreme Court has rejected the plea of passing-on, opining that it would be difficult to compute "actual loss".[183] Claimants must prove that there has been direct or proximate damage to them as a result of the anti-competitive action.[184] The court stated that by not allowing the passing-on defence, it could ensure more effective implementation of anti-trust laws and do away with the difficult task of calculating the damage involved in such cases.

Practically, however, the position has changed over the years with the US court allowing app purchasers to claim compensation, regarding Apple as a distributor and app purchasers to be "direct" customers since the US does not allow indirect consumers

[177] E.U. Directive No. 2014/104/EU, *On Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union*, November 26, 2014, O.J.L. 349.

[178] Otis GmbH v. Land Oberösterreich, Case C-435/18, EU (2019).

[179] Kakkar & Sakle, *supra* note 175.

[180] Kone AG v. ÖBB-Infrastruktur AG,Case C-557/12, EU, (2014).

[181] Niamh Dunne, *Umbrella Effects and Private Antitrust Enforcement,* Vol. 73(3), The Cambridge Law Journal, 510-13 (2014).

[182] Illinois Brick Co. v. Illinois, 1977 SCC OnLine US SC 104 : 52 L Ed 2d 707 : 431 US 720 (1977) : 97 S Ct 2061.

[183] Hanover Shoe Inc. v. United Shoe Machinery Corp, 1968 SCC OnLine US SC 161 : 20 L Ed 2d 1231 : 392 US 481 (1968) : 88 S Ct 2224.

[184] Clayton Act, *supra* note 51, §16.

to claim compensation.[185] The global best practice is to allow the defence of passing-on since this maximises the effectiveness of competition enforcement, while not resulting in unfair advantage to any claimant, and avoiding overdeterrence on the infringer.[186]

To avoid multiplicity of claims against the defender and to ensure maximum efficiency of the proposed private enforcement regime, it is argued that a provision allowing for indirect customers to bring claims for compensation should be made.

C. A CASE FOR ALLOWING STAND-ALONE ACTIONS

'Follow-on' actions refer to claims that are brought after the finding of an infringement by the competition regulator.[187] 'Stand-alone' actions, on the other hand, are not contingent upon a decision by the regulator, but rather are based on a factual finding of infringement as an independent suit. §61 of the Act expressly ousts the jurisdiction of civil courts in any matters where the CCI or NCLAT have jurisdiction under the Act. This clearly implies a negation of stand-alone actions.

Going by the words of §53N of the Act, only when a specific alleged contravention of competition law against an infringing party is established by an order of the CCI, can a claim for compensation for loss be made before the NCLAT.[188] As seen in Part IV, this pre-condition to a compensation claim has been a major roadblock in the utilisation of the existing private enforcement provision in India. Since proceedings in CCI or NCLAT entail costs and time that common people can generally not afford, reform is needed to make the law more accessible. This is buttressed by the fact that litigation itself is a time-consuming, frustrating and expensive endeavour ,which is especially true in civil lawsuits or disputes which can drag on for years, making both the winning and the losing party bear

[185] Apple Inc. v. Pepper, 2019 SCC OnLine US SC 74 : 587 US ___ (2019) : 8.139 S Ct 1514.

[186] *Id*.

[187] Barry J. Rodger, *Why Not Court? A Study of Follow-On Actions in the UK*, Vol. 1(1), Journal of Antitrust Enforcement, 107 (2013).

[188] The Competition Act, 2002.

the pain of a drawn-out procedure.[189] The Law Commission, in its 222nd Report, expressly acknowledged that "delay in disposal of cases in law Courts, for whatever reason it may be, has really defeated the purpose for which the people approach the courts for redressal".[190]

The problem is further aggravated for the primary stakeholder, i.e., a small company. Such companies do not have sufficient resources to withstand prolonged litigation, owing to prohibitively high expenses.[191] On the other hand, larger companies likely to be held liable for anti-competitive conduct possess the ability to engage high-end lawyers[192] and follow legal strategy that may extent proceedings to the point where it becomes unviable for smaller, aggrieved firms.

Further, the effectiveness of CCI itself comes into question on multiple occasions, impacting firms' ability to trust the competition watchdog. From 2011-12 to 2018-19, the CCI imposed collective fines worth Rs. 13,339 crores, but was able to recover only Rs. 60 crores, or less than 0.4 percent of the total.[193] To add to the problem, owing to lack of proper procedures,[194] multiple CCI orders have in fact been quashed on appeal.[195] A Ministry of Corporate Affairs

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[189] *Legal System Too Expensive for Most: Study*, The Hindu, available at https://www.thehindu.com/news/national/Legal-system-too-expensive-for-most-Study/article60338544.ece (Last visited on January 25, 2023).

[190] Law Commission of India, *Need for Justice-Dispensation Through ADR etc*., Report No. 222 (2009).

[191] Gregory J. Myers, *When the Small Business Litigant Cannot Afford to Lose (Or Win): Litigation Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers*, Vol. 39(1), William Mitchell Law Review, 141 (2012).

[192] Richard J. Pierce Jr., *Comparing the Competition Law Regimes of the United States and India,* Vol. 29(1), National Law School of India Review, 53 (2022).

[193] *India's Antitrust Watchdog Barks But Fails to Bite Off,* Livemint, available at https://www.livemint.com/politics/policy/cci-india-s-competition-regulator-has-a-collection-issue-11666791916378.html (Last visited on January 25, 2022).

[194] Ministry of Corporate Affairs, *Report of Competition Law Review Committee,* ¶3.2 (July, 2019).

[195] *Report Finds CCI Procedures Lacking*, Business Standard, available at https://www.business-standard.com/article/economy-policy/report-finds-cci-procedures-lacking-117122300807_1.html (Last visited on January 25, 2022).

Report concluded that CCI needs reforms to ensure a time-bound disposal of cases. Further, it noted the problems specifically with respect to the appellate proceedings, ever since COMPAT was merged with the NCLAT.[196] The workload of NCLAT is already considerable, and added to this is the lack of expertise of tribunal members involved in now deciding both company and competition matters.[197]

In the US, the determination whether a plaintiff may proceed with an antitrust claim is based on an evaluation of several factors, including establishment of a causal connection between the alleged violation and harm occurred, the nature of injury, the proximity or directness of the injury, among others.[198] Similarly, in UK and most EU states, there is a proximate cause standard requiring a plaintiff to establish that the injury was caused in whole or substantial part by the alleged violation of the competition laws.[199] Like India, these countries also have huge populations and a plethora of cases at the disposal of adjudicatory bodies.[200] The European Commission investigates only such cases where larger community interest is found to be at stake.[201] This is also supported by the stance of the European General Court as well, though the reasoning behind the exercise of such discretion has to be specified.[202]

The rationale behind providing for stand-alone cases for private enforcement of competition law is that adjudicatory bodies such as the CCI should only take up such cases of alleged competition infringements where public interest is substantially at stake. This is because there are more cases than resources at the disposal of such bodies.[203] As per §26(1) of the Act, the CCI must refer to

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[196] *Id*., ¶4.2.

[197] *Id*.

[198] Rickj Cornelissen et al., *Netherlands* in The Private Competition Enforcement Review (Ilene Knable Gotts & Kevin S. Schwartz eds., Law Business Research Ltd., 2020).

[199] *Id*.

[200] *Id*.

[201] *Id*.

[202] Automec SRL v. Commission of the European Communities, Case T-24/90 (European Union).

[203] Kakkar & Sakle, *supra* note 175.

the DG all such matters where it is of the opinion that a *prima facie* case has been made out, regardless of the significance of such alleged competition infringement due to the usage of the term 'shall' instead of 'may'. This is in contrast to the discretion provided to other regulatory and adjudicatory bodies, such as the Central Consumer Protection Authority, that retains with it the discretion to pick cases where a preliminary inquiry may be conducted, taking into account the potential harm to public interest.[204]

The authors argue that CCI should also be granted such discretion to choose which cases need an inquiry of the adjudicatory body. As some may argue, this will not compromise the competition law objective of public interest; rather, this mechanism will help further the objectives of both public interest and consumer welfare. Granting this discretion to the CCI will allow it to adjudicate only those cases which have significant public interest at stake and allow other private parties to get compensational remedies through other means. This will eventually pave the way for more entities affected by violations of competition law to get compensation while at the same time serving as a deterrent to violators that their unrestricted misuse of competition law is not without consequences.

D. INTERVENTION OF CCI

Once a provision for allowing stand-alone cases has been made out, it is not to say that the role of the CCI would be limited to using its discretion in taking or rejecting a case. Rather, the role of the CCI can be more enhanced and utilised selectively by providing for its intervention in cases which are being dealt with by other forums. For instance, the EU calls upon its adjudicatory body to submit its views as an advisor of the court.[205] In Hong Kong, the Competition Commission may, with court approval, participate as a full party to the proceedings. A request for such assistance can emanate from the judge or through the parties to the proceedings. In most jurisdictions,

[204] Ministry of Consumer Affairs, *The Central Consumer Protection Authority* (Notified on December 9, 2021).

[205] Kakkar & Sakle, *supra* note 175.

for example, EU member states, Brazil, Japan, the competition agencies are under no obligation to respond positively to such a request.[206]

In order to ensure that the CCI's technical expertise as a regulator is properly considered, this could be done both at the stage of establishing an abuse, as well as at the stage of determining the relief. Injunctive relief can be appropriate in certain cases when complex economic assessments need to be made regarding its applicability. Several amendments must be made to §411(3) of the Companies Act, 2013 in order to allow the appointment of experts in economics as technical members of the NCLAT as well as such a forum in which stand-alone litigation must be instituted.[207]

The *proviso* to §53N(3),[208] which gives power to NCLAT to obtain recommendations from the CCI before passing the order, can be reformed and utilised. During this investigation, the role of CCI would primarily be to provide relevant facts to the NCLAT for the purpose of calculating damages and compensation to be paid. In the event that NCLAT reverses the decision of the CCI and holds a case of infringement is made out, the CCI's initial decision can still provide relevant facts and figures that might be useful for computed claims. It is suggested that policymakers consider the active participation of the DG in the computation process.

Currently, the Act does not expressly empower NCLAT to involve the DG in the compensation computation process, even though the principle of appellate authority has been well laid down by the courts, which states that an appellate authority (in this case, NCLAT) has all the powers of a subordinate court to ensure that justice is served. A NCLAT member can appeal to the DG to order the DG to carry out an investigation in order to determine not only whether a loss has been caused to an indirect party, but also whether

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[206] Mehrotra, *supra* note 163.

[207] Nimit Rajesh Goyal, *The Promise of Private Enforcement of Competition Law in India*, INDIA CORPLAW BLOG, May 6, 2022, available at https://indiacorplaw.in/2022/05/the-promise-of-private-enforcement-of-competition-law-in-india.html (Last visited on July 29, 2024).

[208] The Competition Act, 2002.

that loss has caused a loss to a consumer. Furthermore, the DG can assist in comprehensively examining loss in profits, which by its very nature will have assumptions that the infringing party may challenge. There would be expert testimony, and the DG, while exercising his authority under §41 of the Act, might also help in calculating damages. The DG's inquiry may be useful in calculating damages and gathering other pertinent information.

X. CONCLUSION

Private enforcement of competition law in India has remained underutilised despite having significant potential to further the objectives of competition law. Apart from pendency, the authors also explore structural reasons entrenched in the Competition Act and related procedures themselves that make private enforcement difficult, or rather unpredictable in the Indian setting. Particularly given India's position as a developing economy with the aim to promote consumer welfare, strengthening the private enforcement regime is further emphasised.

By engaging in a comparative analysis of private enforcement mechanisms across jurisdictions, the authors have identified shortcomings under the existing §53N of the Competition Act. Targeted recommendations such as recognition of standalone actions and indirect purchaser claims, and reforming the commitment mechanism have also been explored. The analysis carried out using an economic cross-jurisdictional lens is multi-dimensional and aims to maximise efficiency of the enforcement process by accounting for a combination of private and public mechanisms well-suited to the objectives of the Indian competition regime.

The implementation of the suggested reforms not only aims to strengthen the deterrence objective of competition jurisprudence but also to enable more effective corrective justice for firms or consumers that may have suffered owing to anti-competitive practices.