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India: Individual Culpability: Liability of Directors & Officers Under the Indian Competition Regime

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1. Introduction

As has been the case since time immemorial, directors and officers of companies ('**D&Os**') have had the responsibility (and indeed the duty) to ensure that the best interests of the company, its employees and stakeholders, the community at large, as well as the environment, are adequately safeguarded¹.

This fiduciary duty of the D&Os may, at times, lead to a triaging of interests, whereby some interests – viz. maximising the revenues for the company and its shareholders – may supersede others – viz. acting for the benefit of the community.

The emerging jurisprudence in the space of directors' duties entails an exposure to personal liability for D&Os in default for any violation of the laws, which includes, amongst others, the competition law regime in India.

This article provides an insight into the aspect of individual culpability under the Competition Act, 2002 ('**Act**') and the increasing trend of the competition regulator to penalize the office bearers of companies, thereby making the decision-makers at companies, uneasy.

2. Relevant Provisions Under the Act

Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of the Act is a company (including a firm or an

association), *every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company / association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly* [emphasis added].

Section 27 of the Act empowers the competition regulator in India – the Competition Commission of India ('**CCI**') to impose penalties for anti-competitive agreements and/or abusive conduct, upon "*each of such person or enterprises which are parties to such agreements or abuse*" [emphasis added].

The term "*person*" in turn, has been accorded a wide definition under Section 2 of the Act to include, amongst others, individuals as well.

Thus, in so far as legislation is concerned, individuals' liability is adequately covered within the ambit of the Act.

3. Emerging Jurisprudence on Personal Liability Of D&O Under The Act

Initially when the regulator was still in its infancy, its position on the issue of liability seemed to have been that separate proceedings were required to proceed against directors and officers, which proceedings would need to be initiated after following the necessary procedure².

Then in 2012, in the *Varca* case³, against the Chemists & Druggists Association of Goa (CDAG), it was opined by the CCI that "an association of enterprises cannot be considered as a company and therefore, the office bearers of CDAG would not be covered under section 48 ... so no penalty is leviable on the office bearers".

In an interesting decision on the issue, the CCI while deciding the *Santuka* case⁴ in 2013, attributed liability on to the office bearers of trade associations. In its decision, the CCI held that "the anti-competitive decision or practice of the association can be attributed to the members who were responsible for running the affairs of the association and actively participated in giving effect to the anti-competitive decision for practice of the association."

This thought process of the CCI continued in its decision in the *Prasar Bharti* case⁵ wherein it was held that "[I]n case the DG finds the OP company was in violation of the provisions of the Competition Act, it shall also investigate the role of the persons who, at the time of such contravention, were in charge of and responsible for the conduct of the business of the Company, so as to fix responsibility of such person(s) under section 48 of the Act."

Up until 2013, even though the CCI had attributed liability on to office bearers of companies and associations, no penalties had been ascribed to them in any case. This trend buckled in 2014 when in the *Bengal Chemist* case⁶ (which was investigated by the CCI in its *suo moto* capacity), the CCI not only held the Bengal Chemists and Druggists Association (BDCA) guilty for anti-competitive practices and penalized it, but also held the office bearers of the BDCA guilty under section 48 of the Act. To determine the penalty of the individuals, the CCI took into account, the income

certificates of the concerned office bearers and imposed a cumulative penalty of INR 18.38 crores (of which, the penalty on BDCA was a mere INR 13.24 lakh). This decision was a breakthrough for the CCI, given that this was the first instance wherein penalties on individuals were imposed.

Similarly, the CCI found the office bearers of Indian Jute Mills Association to be vicariously liable and were penalized for their anti-competitive conduct in the *Indian Jute Mills Association case*⁷ in latter half of 2014.

The issue of individual culpability and penalty has now been enshrined in the CCI's thought process and decision-making. Thus, there is now no surprise when office bearers of entities, enterprises, and associations, get penalized for their anti-competitive conduct on a more regular basis. For instance, in the *Macleods Pharma case*⁸ the president of the Himachal Pradesh Society of Chemists and Druggists Alliance was penalized. A similar approach was adopted by the CCI in the *Alkem Laboratories case*⁹, where again, a DGM level individual, along with the Branch Manager and the Authorised Signatory of an association were held to be responsible owing to the "key positions" held by them and were fined in their individual capacities.

By the advent of 2015, the CCI evidently started broadening their focus and started targeting industries other than the pharmaceutical industry, but with the same ideology and methodology. For instance, the transport sector (*Shivam Enterprises case*¹⁰), the entertainment industry (*Kerala Cine Exhibitors case*¹¹) etc.

4. Concluding Words

We have seen an increasing trend, especially in the last couple of years, where the CCI has started seeking individual culpability in cases for which it has penalised organisations. The intent of the CCI by way of this trend is to ensure that the D&Os act carefully and examine the matters before them from all legal angles, while making decisions on behalf of the organisation.

However, the CCI is not dealing with the individual culpability *stricto sensu*, but from the precedents on the subject till date, it appears that the CCI is, at least for the time being, only penalising those individuals whose names appear multiple times and who have been given a fair chance to be heard.

This move has had a mixed response from the corporate sector. While some people feel that individual culpability would help improve compliance of competition guidelines, others feel that such an initiative is hampering the decision-makers in corporate houses from taking risks and being innovative, especially in light of the sanctions against breach of fiduciary duties by directors under the new Companies Act in India.

In our opinion, this emerging jurisprudence could make decision-makers at companies uneasy, but it is actually a good thing from an economic perspective as an organisation is eventually governed by its decision-makers. Proper enforcement and implementation of the competition laws in India will go a long way in attracting

foreign investments into India as in any competitive economy / market, a potential investor will value a level playing field and assurances that the government will not accord unfair advantage to domestic players.

Footnotes

1 Sec 166(2) of the Companies Act

2 *Kapoor Glass Pvt Ltd v Schott Glass India Pvt Ltd*, Case No. 22 of 2010; *GKB Hi-Tech Lenses Pvt Ltd v Transition Optical India Pvt Ltd*, Case No. 01 of 2010

3 *Varca Druggists & Chemists v Chemists & Duggists Association, Goa*, MRTP Case No. C-127/2009/DGIR (4/28)

4 *M/s Santuka Associates Pvt Ltd v AIOCD & Ors*, Case No. 20 of 2011

5 *Prasar Bharti (Broadcasting Corp of India) v TAM Media Research Pvt Ltd*, Case No. 70 of 2012

6 *Bengal Chemists and Druggists Association, Suo Moto* Case No. 2 of 2012

7 *Indian Sugar Mills Association v Indian Jute Mills Association*, Case No. 28 of 2011

8 *M/s Rohit Medical Store v Macleods Pharmaceutical Limited & Ors*, Case No. 78 of 2012

9 *P.K.Krishnan v Alkem Laboratories & Ors*, Case No. 28 of 2014

10 *Shivam Enterprises v Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors*, Case No. 43 of 2013

11 *Kerala Cine Exhibitors Association and Kerala Film Exhibitors Federation*, Case No. 45 of 2012

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.