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Indian Competition Law Design: Private v. Public Enforcement

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Abstract

Private or public equipment might be used to start a process of enforcing the law. According the initiation's nature the cures and processes involved also vary.Indian competition law originally was designed to follow both private and public enforcement models, however the same was transformed to mere public enforcement post the 2007 amendment. This shift in the enforcement channel has also impacted the rights of the private individual but also affected the efficiency of the enforcement system. .As a consequence of anti-competitive conduct, people and businesses that have been harmed must be justly compensated for their losses by commercial police agencies, per a majority opinion.In the same vein, it is critical to accomplish a healthy equilibrium between formal and informal *enforcement. Antitrust law and policy, as well as private antitrust action, need to be seen as an integrated and comprehensive system. Inside this system, several factors contribute to the complementary aims of deterrence but instead compensation.The crucial to achieving that private policing does not negatively affect the effectiveness of public policing and encourages greater adherence with antitrust rules while attempting to avoid litigation that is incredibly inefficient and could dissuade socially beneficial behaviour is to obtain the appropriate balance between such tools and goals.*

Keywords:*Public Enforcement, Private Enforcement, Law Design, Institutional Structure,* Law enforcement

Introduction

Law enforcement machinery can be set to move either through *public enforcement*, private enforcement, or both. Public enforcement falls within the domain of state agencies, and the outcome of the proceedings is punitive. An action for remuneration for the loss suffered is included in private enforcement. Enforcement measures in so many countries had a substantial effect on the implementation of competition laws. However, its relevance of it varies from country to country.he state enforces laws concerning public benefits and public protection through institutional machinery to investigate and prosecute. This form of enforcement is called public enforcement of laws. Private persons should enforce laws that deal with transactions among the private person and are usually enforced by filing a private complaint or civil suits. Here the burden of prosecuting the case (including the production of evidence to support the claim) lies on the private person, and he must bear the resultant enforcement costs. This mechanism of enforcement is called private enforcement. However, this division is not strict, as public law is often enforced through private enforcement.

The other distinguishing feature of public and private enforcement lies in the remedies sought

through these mechanisms. Public enforcement attempts to control socially harmful behaviour. Thus, the appropriate remedy is to impose sanctions (penalty) through various institutional arrangements to create deterrence and obtain required compliances (Polinsky, 1980). Remedies pursued in private enforcement are more like restitution and recognising the individual‟s right to property. In this context, the long-debated question of the ideal enforcement model for a public law like competition lawhas been revolving around the two methods of enforcement. "Public Enforcement" (State‟s obligation to initiate enforcement through its agencies); or "Private Enforcement" (right of a private person to initiate enforcement) (Becker and Stigler, 1974; Lande and Posner, 1975). Instead of participating in the debate, we see some functional features of public and private enforcement and analyse them in the context of Indian competition law‟s enforcement framework.

Public v. Private Enforcement

Justification for *public enforcement* of laws can be found in Thomas Hobbes‟ *Leviathan*, founded upon the principle that the sovereign and its rule on the commonwealth has the absolute authority to protect the wealth in the common defence (Hobbes, 1651). These sovereign functions of the state are inalienable.[i] Public enforcement of the law is a function of the state, and an appropriate enforcement design also falls within the state‟s legislative power. It is fair to have a public monopoly over law enforcement. In a welfare state, individuals should divert their resources from self-protection and self-help to other productive activities (Kent Roach and Mitchell J. Trebilcock, 1996). Thus, public enforcement becomes a leading law implementation and enforcement strategy, introducing regulatory bodies and bureaucratic control over the enforcement.[ii] Further, with the growing complexities of the transaction, a specialised and expert regulator for a particular sector is better positioned to enforce the law than courts which may lack the expertise required for such specialised laws (Roach &Trebilcock, 1996).

The public enforcement model is the main ingredient that determines how competition law is enforced.However, it is not the sole model, as public enforcement may bring an anti-competitive activity to an end but does not afford to restitute the loss suffered by victims. Some jurisdiction also blends private enforcement mechanism within or beside their public enforcement (Gerber, 2007). There has been a great deal of research in the fields of law and economics on enforcement, perhaps one of the most frequent conclusions is that private enforcement is an effective supplement to official enforcement. (Polinsky, 1980). As a consequence of the government's inability to effectively enforce a law and the substantial risks posed by corruption, negligence, as well as inactivity on the part of the public entities, this hybrid methodology was built.

For a variety of reasons, government bodies cannot be required to carry out all or even the large percentage of the requisite enforcement activities (Stewart and Sunstein, 1982), unawareness of industrial environments (Lande and Davis, 2008) and politically driven government decisions are just a few of the more prominent ones to consider (CEPS, 2007).In public enforcement, the expected gains of a public enforcer (fixed salaries) from the enforcement are lower than violators‟ expected loss, and they may be more vulnerable to corruption by diluting the enforcement process (Becker and Stigler, 1974). Further, even though the private individual may

report violations, the competition authority is not obliged to inquire about such information (Wils, 2009).[iii] Even in the absence of corruption, discretionary non-enforcement is facilitated because of the open-textured language of the law (Landes and Posner, 1975).

It's not only because commercial enforcement addresses the issue of government budget constraints, but also that individuals are closer to the damage and have an identity of the perpetrator. This renders private enforcement more efficient (Martini and Rovesti, 2004).Further, as stated above, the remedies pursued in private enforcement are in the form of restitution. The action here essentially is for claiming damages /compensation, which has two-fold purposesiv; Initially, the individual is placed in same position as if the anti-competitive activity had not actually occurred when the judge rules the person to make restitution. Second, when consumers of anti-competitive harm have information about name of the person that violated the law, enabling such compensation actions will encourage victims to initiate legal processes, which will then enable police officers to make use of the data that victims have.(Shavell and Polinsky, 2007).Such a mechanism encourages people to reveal anti- competitive conduct because of the economic incentives involved. Further, encouragement among the victims also increases the deterrence among violators due to a higher probability of anti-competitive conduct‟s reporting.vThis dual control leads to the formation of a healthy culture of competition, which is beneficial for customers.(Shavell, 1997; Stephenson, 2005In this context, the preventive and rehabilitative tasks of competition law are complementary to one another. On either hand, some academics believed that both private and public enforcement constituted an excessive amount of police departments.(Bierschbach and Alex Stein, 2005; Lemos and Max Mizner, 2014). A higher penalty (compensation) will encourage monetarily motivated private enforcers to dedicate more resources to enforcement than required to detect and punish violators at a socially optimal level. On the contrary, merely having public enforcement also poses the threat of under-enforcement.

Private enforcement can be used in conjunction with public police as a "follow-on action" or as a "stand-alone action" depending on how well the two mechanisms are joined. After a competent public authority or court has validated a finding of the a breach of the law, "follow-on actions" might be undertaken. As a consequence, the right to bring a lawsuit is made subject to such a decision. "Stand alone actions" do not necessitate a public authority or court's prior findings, and once the cause of action emerges, action may be initiated in the appropriate forum.(Segal and Whinston, 2006). The existence of “stand-alone” and “follow-on” actions can yield a deterrent effect–the former through enhanced detection and the latter by signalling higher expected losses of the violator (CEPS, 2007).

Thus, based on the above classification, the choice of enforcement mechanism can be from three models - (i) Public Enforcement; (ii) Private stand-alone action; and (ii) Private follow-on action.Certain jurisdictions like the United States, Australia, and Canada have adopted all three models in their competition law framework. In contrast, few like India, Hong Kong and South Africa have adopted *public enforcement* with only *private follow-on action*.

Comparative examination of compliance methods in different countries reveals that formal and informal enforcement are used in conjunction as a separate style of competition law comple menting each other's efforts. The vast majority of antitrust laws in the United States is done out b

y private law firms.The anti-trust suits constitute approximately 96% of the anti-trust litigation initiated by a private person, and the remaining 6% is only through public enforcement (Jones, 2016). "Action for Treble damage" (a popular name for private enforcement) in the USA has facilitated the enforcement of the anti-trust laws (Connor and Lande, 2015),[vi] brought about effective deterrence of future violations and provided relief to those injured by anti-competitive conduct (Lande and Davis, 2011). Relatively recently, the EU has start to realise the importance of private action as part of the enforcement regime and has recognized that citizens have a right to demand compensation for behaviour which restricts or distorts competition in the market..[vii]The current Anti- trust Civil liability Directive offers an organised approach to ensuring the full effectiveness of EU competition law via private enforcement. As according European Union courts, private people may use Articles 101 or 101a as well as 102 of the TFEU in national court actions (Jones and Sufrin, 2011). Nevertheless, there have been only a handful of anti-trust lawsuits brought by private individuals in federal courts. Since the introduction of damage directives in 2014, the number of complaints has increased. In 2015, there were only 50 instances of damage claims, butthat number has actually risen to 239 in 2019. (Laborde, 2019).

Similarly, Australia has also presented positive signs of *private enforcement*, as 26% of cases were contributed by the private plaintiff from 2000 to 2014 (Wells, 2016). Most countries have adopted a mixed public Enforcement and Private Enforcement (both types), which complements each other. Table 1 below gives a glimpse of the components of the enforcement mechanism in select Asian countries.

Table 1: Comparative Enforcement Mechanism in select Asian Countries

The

S. No.	Jurisdiction	Public Enforcement	Private Stand-Alone Enforcement	Private Follow-on Enforcement	Authority for Enforcement
1.	China	YES	YES	YES	Distinct
2.	Hong Kong	YES	NO	YES	Common
3.	India	YES	NO	YES	Common
4.	Japan	YES	YES	YES	Distinct
5.	Korea	YES	YES	NO	Distinct
6.	Malaysia	YES	YES	NO	Distinct
7.	Singapore	YES	NO	YES	Distinct (till 2018)
8.	Thailand	YES	YES	NO	Distinct
9.	Taiwan	YES	YES	YES	Distinct

comparison above highlights the enforcement mechanism of competition laws thatcountries have adopted. In general, the countries adopt strategies for enforcing competition laws. However, along with this combination, one peculiar nature is that in most countries where all the three

mechanisms are adopted, generally distinct authorities/agencies are entrusted with its enforcement. In these countries, agencies authorised to carry out public enforcement are vested with administrative authority, and for private enforcement, the power is vested with the courts (adjudicatory authority). For example, the Japanese Anti-Monopoly Act, 1947 entrusts public enforcement to Fair Trade Commission;[viii] however, compensation claims are submitted to the courts.Singapore had provided two distinct authorities until 2018. However, since 2018 the "Competition Commission of Singapore" has been entrusted with more powers related to consumer protection, and now the agency is called "Competition and Consumer Commission of Singapore" (LOO and ONG, 2017).[ix]

The above comparison highlights that for having public and private enforcement simultaneously, the institutional structure of the competition authority has to be distinct. As per available literature, the design of competition authority can be a judicial or administrative body (OECD, 2003; Trebilcock and Lacobucci, 2010; Crane, 2011; Kovacic and Hyman, 2012). When we talk about the judicial model for the competition law authorities, it mainly involves certain adjudicatory functions under the law. For this, an investigative and prosecutorial wing will be created by the law to initiate an action. This bifurcated judicial model separates public and private enforcement, wherein investigations and the prosecutorial wing will take charge of public enforcement. Private individuals can approach courts directly with action for damages.

Similarly, in the administrative model, the investigation and adjudicatory functions lie with a specialised commission/tribunal, including judicial and non-judicial members. Within the organisational model, there are two approaches: (i) bifurcated agency model–wherein the investigation is a function of a Commission and adjudication is entrusted with the specialised tribunal headed by judicial and non-judicial members; (ii) Integrated agency model–wherein both investigative and adjudicatory functions are integrated into one authority. These models often create bias, as one investigating agency also adjudicates on the conduct (Wils, 2004).

To place private and public enforcement simultaneously, most jurisdictions use a bifurcated judicial or administrative agency model, keeping in view the nature of adjudication required in a private action for damages. Thus, the object of law and institutional design relates to the method of enforcing the law. This makes it essential to understand the structure of the Indian competition authority and its enforcement mechanisms.

Institutional Structure of Composition of CCI

In accordance with the provisions of the Act in its original form, the Competition Commission (hereafter referred to as "CCI") was established as a fully integrated body with authority to investigate, administer, as well as render judgments. In the minds of all those who drafted the Act, the CCI was conceived of as a semi entity that had both executive as well as adjudicatory authority..[x] Unlike the erstwhile MRTP Commission, a unitary tribunal,[xi] CCI was envisioned to have benches with distributed power and functions.[xii] Keeping in view the adjudicatory functions of CCI, it was thought to appoint a serving or retired judge of the High Court as the Chairperson of the CCI.[xiii]

For the appointment and constitution of CCI, the Central Government notified the Competition

Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003 in exercising their power[xiv] and appointments were made thereunder. One of the initial hurdles to CCI‟s composition was a constitutional challenge to its institutional model in *BrahmDutt*v. *Union of India.*[xv] The challenge was founded on CCI‟s adjudicatory power enacted under the Act, which requires a judicial member in the commission, whom the government cannot appoint but has to be appointed in consultation with the Chief Justice of India. The jurisprudence of this approach concerning the constitution of tribunal/administrative commission can be traced from the decision of the *Sampath Kumar Case,*[xvi]wherein the Supreme Court has ruled that the appointment of members of an administrative tribunal, discharging adjudicatory function cannot be done entirely by the government under its executive power. Instead, in appointing members, two-approach suggested to being followed as a process of appointment (i) executive power of appointment in consultation with the Chief Justice of India; or (ii) through a selection committee, headed by CJI or his nominee. For the composition of CCI, the contention made in the *BrahmDuttcase*[xvii]was founded on the jurisprudence of the *Sampath Kumar case*[xviii] and challenged Rule 3 of the CCI Selection Rules,[xix] which overlooked the role of the Chief Justice of India in the selection of Chairman and Members of the CCI. The challenge primarily was on various adjudicatory powers conferred on CCI, and the appointment of the judicial members in CCI was not in accordance with established principles of constitutional law.[xx]

However, *BrahmDutt's* petition was dismissed without a formal decision, as the Supreme Court considered the affidavit filed by the government for making suitable amendments in the Act, which was given effect in 2007. One of the critical observations made by the Supreme Court, in this case, was to create two separate wings within the commission, one investigative and administrative and the other adjudicatory, which is like Bifurcated Agency Model. However, post-2007 Amendment, specific structural changes were made within the powers of CCI concerning investigation and inquiry to restrict the administrative and adjudicatory powers (Ramesh, 2016). Most powers of CCI, like settling the dispute between two parties, specifically the adjudication on compensation, were given to the newly introduced Competition Appellate Tribunal (*hereinafter* "COMPAT"),[xxi] which a judicial member heads.[xxii] To bring accountability to CCI‟s limited adjudicatory role, one can prefer to appeal to COMPAT.[xxiii] In recent, the authority of COMPAT has been vested with National Company Law Appellate Tribunal (*hereinafter* "NCLAT"), with effect from May 26, 2017.(Merwin, 2017)[xxiv]*(In this study, the phrase "Appellate Tribunal" means COMPAT or NCLAT, as the case may be)*

Post-2007 Amendment, CCI was reconstituted, and the actual enforcement of the Competition Act, 2002 (hereinafter "the Act") started on May 20, 2009. In the context of CCI‟s present composition and authority, the Supreme Court in the *Steel Authority of India Case*[xxv] observed that CCI is vested with inquisitorial, investigative, regulatory, adjudicatory, and advisory jurisdiction under the scheme of the Act. Thus, even post the 2007 amendment, the fundamental basis of challenge on „adjudicatory powers‟ still subsists. However, the present adjudications are more in terms of regulatory orders than disputes between two parties. Clarifying the position of CCI, recently, in the matter of *Mahindra Electric Mobility Ltd. case,*[xxvi] Delhi HC has reiterated

the position of CCI‟s institutional structure. The court stated that -

"CCI is structured and set up as an expert regulatory body performing the role of independent regulator/watchdog for the economy in the same mould as Securities and Exchange Board of India performs qua the securities market. In the course of its functioning CCI undertakes executive adjudication in juxtaposition to judicial adjudication in respect of all aspects entrusted under the Competition Act. Therefore merely because CCI performs adjudicatory functions, it does not acquire the character of Judicial Tribunal or Court."[xxvii]

From the Supreme Court and Delhi High Court‟s decision, it seems that there is no impact of the 2007-amendment on the nature of CCI‟s authority. There cannot be any simplified pigeonholes for designing a regulatory body. Preferably, each regulatory authority responds to its legislative mandate. For CCI, the same is to respond to the rapidly changing economy with imperatives of global trade and its interface with technology. Thus, keeping this in mind, CCI is entrusted with multifaceted roles: administrative, adjudicatory, and quasi-legislative.

Taking away Private Enforcement

As we have understood the word „private enforcement‟ above, the erstwhile MRTP Act consisted of "private stand-alone action" and "private follow-on action".[xxviii] Compared to it, the Act contains only private follow-on action. Section 53N of the Act replaces Section 12B of the MRTP Act, 1969. However, the stage of exercising the right to claim compensation has changed drastically under the present competition law.

Following the 2007 Amendment to the Act's Section 19(1)(a), the term "complaint" was changed to "information." Thus, it follows that the person who is reporting the violation really shouldn't be a victim of the behaviour that is being reported. The impact that this Amendment had may be observed in Section 26 of the Act as a result of its adoption. The complainant will not be invited to participate in the required hearing. According to the law as it now exists, the CCI is not required to provide the source with a copy of a inquiry report that they have completed. The CCI encourages 'parties' who are worried to express their objections to the information, however there is no option for hearing the party that is actually impacted by the material. Despite the fact that authorities in charge of contests are required to conform to natural justice standards,[xxix] these rules operate only in those areas not covered by a valid law. Rules of principles of natural justice do not replace the law but complement it.[xxx] As held in the *LK Ratna case*,[xxxi] *"the principle of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary"*. Thus, where the procedure followed by the statute has gaps, such gaps must be supplemented by relevant norms of natural justice. On the contrary, when there is a well-defined provision that explicitly provides for the procedure to be followed for investigation and inquiry, then principles of natural justice will not replace these rules. If the statute provides the informant‟s right to file suggestions and objections, the informant‟s right is limited.

Further, the private remedy for the informant, which was previously available in Section 27 (c) of the Act *(omitted)* in the form of the right to compensation by CCI, was also done away with in the 2007 amendment.[xxxii] Thus, as per the present scheme of the Act, post - 2007 Amendment, the person who suffered a loss due to anti-competitive conduct must file an application to the

Appellate Tribunal under Section 53N of the Act after the finding of the Commission or Appellate Tribunal has attained finality. However, where an order is appealed in the Supreme Court under Section 53T of the Act, the order‟s finality will depend on the appeal‟s decision. In the absence of express provision, any determination conferring finality may not entitle the person to apply for compensation under Section 53N of the Act if the literal interpretation of the provision is followed. However, this is unlikely to happen as the challenge in SC is on questions of law, and the determination of anti-competitive conduct involves questions of fact. In an event SC sets aside the finding of no-contravention from an order arising from CCI or Appellate tribunal, the matter shall be remanded back to the CCI for fresh investigation and inquiry, and as a result, based on such finding in remand, the person‟s right to compensation will not be defeated.

2007 Amendment to the Act has led to a complete change in the private enforcement process, and *stand-alone private action* is now transformed into *private follow-on actions.* It must be noted that, before the 2007 Amendment, Section 34 of the Act allowed the application for compensation independently of any prior finding. Further, this was a similar situation in the MRTP Act. However, Section 53N of the Act has not just transposed Section 34 of the Act, but there is a complete shift in the nature of the right conferred. Section 34 of the Act *(omitted)* provided the right to claim compensation at CCI for any contraventions of Chapter II, and such a right was without prejudice to any provision of the Act. Said provision conferred the stand-alone action right on the injured party. Post – 2007 Amendment, authority to award compensation was vested in the appellate tribunal in Section 53N of the Act, which requires prior finding on the contravention of chapter II provisions.

Section 34 of the Act *(omitted)* was akin to Section 12B of the MRTP Act, and both provided similar right to compensation without prior finding and were stand-alone actions. As held in *Girish Chandra Guptav.UP Industrial Development Corporation Limited,*[xxxiii]there is no requirement for separate proceedings for making an application for the claim of compensation under Section 12B of the MRTP Act. MRTP Commission was vested with concurrent power to award compensation and civil courts. Exercise of such jurisdiction to award compensation by MRTP Commission or Civil Courts does not require a prior finding of contravention. Civil courts can also decide on compensation irrespective of the commission‟s finding, as the competition analysis, as required in the present Act, was not needed. MRTP Commission has passed numerous compensation orders for the alleged contravention of MRTP Act provisions under its authority.[xxxiv] Around 923 compensation applications were made to MRTP Commission from 2001 to 2009, suggesting that this form of stand-alone action was well-founded in the erstwhile regime.[xxxv]

Before the 2007 Amendment, CCI was allowed to decide on a claim for damages under Section 34 of the Act in its original state of the Act (omitted). The procedure for restitution was created in accordance with previous law. Although Section 34 of the Act wasn't really utilised, a new provision, Section 53N of the Act was established in its place. CCI's adjudicatory powers were

curtailed, and this new provision was a consequence. Due to the adjudicatory character of granting compensation, the Appellate Tribunal, which would be led by a member of the judiciary, was given jurisdiction to do just that..[xxxvi]The new provision has a large number of alterations. The experience of a stand-alone action has been converted into a follow-on case, in which the commission's finding determines whether or not reimbursement claims may be applied.. Therefore, a person cannot directly apply for compensation, and her right to claim compensation develops until a finding of breach of the Act's requirements is made by the Competition Authority. This also implies that a person's entitlement to recompense will be thwarted if the Regulatory Agencies fail to discover a contravention or pass an incorrect finding of non-contravention that has achieved finality. Even if he has been injured, he has no recourse. An appellate court process has been required by law in order to ensure that chance of an incorrect judgement is removed; despite this, it cannot be entirely out that a higher appellate court may make mistakes.

It's important to note that in the previous, bringing a action for compensation via MRTP Tribunal was just an extra way of someone who had been harmed to seek justice.Section 12B of the MRTP Act expressly provided that *"…without prejudice to the right of such government, trader, or class of traded, or consumer to institute a suit for recovery of any compensation for the loss or damage so caused, make an application to the Commission…"*. This idea of the additional forum was reinforced by Sub-Section (4) of Section 12B of the MRTP Act, which provides for a set-off for the amount paid or recovered in pursuance of an order made by the commission.[xxxvii]The MRTP Act stipulates that anyone who is harmed or suffers a loss as a result of action that is prohibited by the act may suit in civil court or file a complaint with the MRTP Commission for reimbursement. If the MRTP Commission receives its payment, that amount should be able to be offset in any civil law suit..

Section 53N of the Act does not contain such a provision, although Section 61 of the Act limits its civil courts' sense of hearing cases that fall under the scope of the Law.[xxxviii]Section 61 of the Act nullifies criminal court jurisdiction over any issues that fall within the jurisdiction of the CCI or Appellate Tribunal. Courts' jurisdiction is gone since the Appellate Tribunal has been granted exclusive authority to award damages. Appellate Tribunal damages allegations will no remain an option for a party under the new scheme, which does not provide any new jurisdiction.These procedures suggest a lack of private enforcement of competition law under Indian law (stand-alone action). Data on suspected anti-competitive behaviour can only be provided by the private person. If a violation of antitrust law provisions is discovered as a result of an investigation and inquiry based on that data, structural remedies, behavioural remedies, or monetary penalties will be applied. Section 53N of the Act contemplates a "follow-on" action that cannot be regarded purely as private prosecution. When a person is entitled to payment, the law has already been implemented, and it is just restitution that is needed. Because the informant has no direct remedy or motive to pursue, there is no deterrent in detecting a violation.

Optimal Enforcement Design

CCI is under a continuous duty to protect consumer interest and consumer welfare as the goal of Indian competition law, and the statutory framework for private enforcement discourages private individuals. The principle of remedy that *"where there is a right, there is a remedy*" seems to have been negated under the Act. For effective enforcement of the law, the stakeholders, consumers, and competitors must be equipped with an appropriate remedy for restitution. In this process, stand-alone private action is right headed. Due to the level of proceedings involved and the time taken to dispose of cases, very few matters have reached the stage of follow-on actions. To date, we have not witnessed any order of compensation, though eight applications are known to have been pending in NCLAT.[xxxix] It is to be noted that CCI has passed almost 140 contravention orders in the last decade. Still, the actual claim of compensation is very low, with nearly 5% of total contravention orders, which is very low compared to jurisdictions mentioned above in terms of their private enforcement mechanism. Follow-on actions have resulted in the undue delay in the restitution of loss suffered due to competition injury. Restitution is one of the competition law functions, and across various jurisdictions, the same has been adopted as a part of the stand-alone action. A mixed enforcement mechanism provides scope for manifold ways of detecting an anti-competitive activity, a *sine qua non* for protecting, promoting, and maintaining competition through law enforcement.

A blended enforcement mechanism offers enforcement channels either through state functionaries or through a private individual (Polinsky, 1980). Public enforcement may bring an anti-competitive activity to an end but cannot afford to restitute the victims‟ loss. Individuals‟ private enforcement helps avoid the resource constraint the public authorities face in enforcing the law as the cost burden shifts to the individual to prosecute and prove (Lande and Davis, 2008). Further, private individuals are more immediate to the harm and possess a violator‟s identity (Martini and CinziaRovesti, 2004). The remedies pursued in private enforcement are in the form of restitution. The action here essentially is for claiming damages/ compensation, which has two-fold purposes;[xl] In the first place, the person is placed in same position as if the anti-competitive behaviour hadn't ever taken place if indeed the remedy is deemed to be restitutory. Second, when survivors of anti-competitive harm have identifying information of the person who violated the law, allowing such compensation acts will encourage survivors to initiate legal proceedings and, as a consequence, law enforcement would then benefit from the information which these victims have to offer. conduct because of the economic incentives involved. Encouraging victims to report anti-competitive conduct increases the deterrence amongst infringers due to a higher probability of being reported for anti-competitive conduct.[xli] This dual control helps in generating a favourable competition culture, which is valuable for the consumer (Shavell, 1997; Stephenson, 2005).
The prevalent model of commercial criminal prosecutions in competition law enforcement narrows overall scope of remedial punishment and does not discourage the identification of infractions. The premise behind follow-on action is that public policing is sufficient to identify

all cases of competition violations of the law. However, ordinary persons are not permitted to file claims in cases in which regulatory agencies fail to follow up with the perpetrator as well as, as a result, the offender is able to flee the jurisdiction. Furthermore, the government enforcement system relies primarily on government servants and the private enforcer plays a little or non-existent complementary role.Though public enforcement creates deterrence of hefty monetary penalties, the fines collected by the Competition Authorities are deposited in Consolidated Fund. They may be indirectly redistributed to society, but the informant does not get a direct incentive.

Conclusion

Providing a stand-alone right of action confers the source of information and, coupled with the possibility of damages, provides an incentive to sue a potential private informant (Singh, 2004). While it's impossible to prevent inherent difficulties of public compliance, it's possible to prevent the arbitrary non-enforcement of government authorities by implementing a rival model of enforcement. Consideration of two separate organisations, the advisory and regulating, and the other adjudicatory, was relevant to the Supreme Court's observation some time ago..[xlii]Public enforcement would go via the advisory as well as regulatory wing, whereas private enforcement may go through the adjudicatory wing with appropriate authority. A major advantage of the this system is that it allows both formal and informal enforcement to work in conjunction, increasing the likelihood of solving crime in the act. It will be much easier to prevent trying to engage in anti-competitive behaviour if private lawsuits for harm are urged. This will instil a sense of dread in the minds of those that would engage in anti-competitive behaviour, increasing the probability that they will abstain from performing the behavior in question. The modification will call for adjustments to the general layout of the organization. Recent months have already seen Australia, Singapore, and the United Kingdom make meaningful shifts in their approach to prosecution, using both conventional and alternative types of enforcement. A reform in this area will increase participation from all of the parties concerned, which will lead to more democracy of the enforcement mechanism.

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[i] *See*,N.Nagendra Rao & Co v. State of A.P., AIR 1994 SC 2663, ¶25,

[ii] *For Example:* Security and Exchange Board of India, Central Electricity Commission/State Electricity Commission, Insurance Regulator and Development Authority etc.

[iii] *See also,* Reprographic India v. Competition Commission of India and ors., Competition Appeal No. (AT) No. 09/2019 (NCLAT) [Decided on 26.02.2019].

[iv] Pfizer, Inc. v Government of India, 434 U.S. 308.

[v] Ballarpur Industries v. Sinaraman, [1996] 87 CompCas 159

[vi] *See,* §4 of the Clayton Act 1914 (USA).

[vii] *See,* Courage v. Crehan, Case C-453/99 [ECJ]; See also, Manfredi et al. v. Lloyd Adriaticoassicurazioni Spa e Assitalia Spa, C- 295/04 [ECJ]

[viii] *See,* Chapter VIII of the Anti-Monopoly Act, 1947 (Japan)

[ix] *See,* Part II of the Competition Act, 2004 (Singapore).

[x] *See,* Statement of Object and Reasons, Competition Bill, 2001 ¶3

[xi] *Cf.* §5, 10, 12, 12A, 12B of the MRTP Act, 1969

[xii] §23 of the Competition Act, 2002 (now Omitted by the Competition (Amendment) Act, 2007]; *See also,* 93rd Department Related Standing Committee Report, Para 4.4.5.

[xiii] 93rd Department Related Standing Committee ¶ 9.4.1
[xiv] §63 of the Competition Act, 2002 (Power to make rules)
[xv]*See*, BrahmDutt v. Union of India, (2005) 2 SCC 431.
[xvi] S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124; See also L. Chandra Kumar v. Union of India, (1997) 2 SCC 261.
[xvii]*Supra* note 15 (BrahmDutt).
[xviii]*Supra* note 16 (Sampath Kumar).
[xix]The CCI (Selection of Chairperson and Other Members of the Commission) Rules, 2003.
[xx]*Supra* note 16 (Sampath Kumar).
[xxi] Replaced with NCLAT
[xxii] §53A of the Competition Act, 2002
[xxiii] §53B of the Competition Act, 2002
[xxiv] Amended through Part XIV of Chapter VI of the Finance Act, 2017.
[xxv]Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744 ¶9
[xxvi]Mahindra Electric Mobility Ltd. v. Competition Commission of India and Ors., 2019 SCCOnline Del.8032.
[xxvii]*Ibid* at ¶52
[xxviii] §12B of the MRTP Act, 1969
[xxix] §36 of the Competition Act, 2002.
[xxx]Jain Exports (P) Ltd. v. Union of India, (1988) 3 SCC 579, ¶12.
[xxxi]Institute of Charted Accountants v. L.K Ratna, AIR 1987 SC 71, ¶16.
[xxxii] Prior to 2007 Amendment Section 27 read along with Section 34 of the act empowers Commission to award compensation.
[xxxiii]Girish Chandra Gupta v. UP Industrial Development Corporation Limited, AIR 2013 SC 352; See also Saurabh Prakash v DLF. Universals Ltd., (2007) 1 SCC 228.
[xxxiv]*See generally*, In Re: Sheri Louise Slimming CenterPvt. Ltd UTP Enquiry No. 26/1986 (MRTP); In Re: Eskay Electronics (I) Pvt Ltd. UTP Enquiry No. 325/1988 (MRTP); In Re: Dhantak& Co. UTP Enquiry No. 382/1988 (MRTP); In Re: Medical Hair Center, Compensation Application No. 216/1989 (MRTP).
[xxxv]*See*, Aditya Bhatacharjea, „Of Omissions and Commissions: India‟s Competition Policy‟ (2010) 35(33) Economic and Political Weekly 33.
[xxxvi] §5(2) of the MRTP Act, 1969; 44thStanding Committee Report on Competition Bill (2006), ¶75 *available at*<http://www.prsindia.org/uploads/media/1167471748/bill73_2007050873_Competition_Bill__2006_standing_committee.pdf> accessed on 22 March 2014
[xxxvii] Y.P. Mahana v Bharat Televisions, [1994] 81 CompCas 277
[xxxviii] §61of the Competition Act, 2002
[xxxix]*See*, (i) East India Petroleum Pvt. Ltd. v. South Asia LPG Co. Pvt. Ltd. &Anr., CA (AT) No. 70/2018; (ii) Satyendra Singh &Anr. v. Ghaziabad Development Authority &Anr., CA (AT) No. 26/2018; (iii) Food Corporation of India v. Excel Crop Care Ltd. &Ors., CA (AT) NO.79-81/2012; (iv) G. Krishna Murthy v. Karnataka Film Chamber of Commerce &Ors., CA(AT) No. 96/2018; (v) Maharashtra State Power Generation Co ltd v. Nair Coal Services Ltd Ors, CA (AT) No. 02/2018;(vi) Sai Wardha Power Ltd. v. Coal India Ltd. &Anr., Transfer CA (AT) (Compt.) No. 01/2017; (vii) Metropolitan Stock Exchange of India Ltd. v. National Stock exchange of India Ltd., Transfer CA(AT)(Compt.) No. 02/ 2017;(viii)Crown Theatre v. Kerala Film Exhibitors Federation, C.A.(AT) (COMPT.) NO. 01/2017.
[xl] Pfizer, Inc. v Government of India, 434 U.S. 308.
[xli]Ballarpur Industries v. Sinaraman, [1996] 87 CompCas 159
[xlii]*Supra* note 15 (BrahmDutt).

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