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Anti-Trust Enforcement In India: Exploring Individual Liability

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This paper reviews the enforcement of individual liability under the anti-trust law in India. Section 48 of the Competition Act, 2002 recognizes an important cornerstone of corporate governance; that a company acts through its individuals. This provision allows the Competition Commission of India to hold individuals that direct the business of a company liable for anti-trust offences committed by such company. Such individuals, as in any other corporate misdoing, must be subjected to adequate penalties in appropriate cases. In such cases, the Commission and its Director-General (its investigative arm) must conduct a thorough investigation into the matter to ensure that liability is imposed based on the actual involvement of the individual, rather than based on assigned roles and designations. In this light, this paper reviews the investigative ethos, policy and procedure of the Commission in such matters. Primarily underscoring the need for meaningful investigations and fair and equitable enforcement of individual liability, this paper sets out findings and recommendations in relation to sequencing, standard of proof, procedure, and the scope of investigations under the Competition Act.

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I. INTRODUCTION

The Competition Act, 2002 (Competition Act) is the forbearer of anti-trust law in India and is intended to serve as the protector of its post-liberalisation free market economy. It was enacted to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade in India.[1] Its core focus is three-pronged: first, the Competition Act prohibits anti-competitive agreements that result in an appreciable adverse effect on competition in the Indian markets.[2] Secondly, the Competition Act prohibits a dominant enterprise[3] from abusing its position in the relevant market of its operation.[4] Thirdly, the Competition Act regulates mergers and acquisitions meeting the prescribed asset or turnover thresholds, to ensure that such combination does not cause an appreciable adverse effect on competition in India.[5] To enforce these provisions, the Competition Act grants the Competition Commission of India ("the Commission") the power to issue appropriate penalties, orders and directions.[6] Contraventions of these provisions also attract significant penalties of up to 10 per cent of the average turnover of the enterprise for the preceding three financial years in case of an anti-competitive agreement or abuse of dominance, and in case of cartels, up to three times the profit for each year that the cartel exists.[7]

The Commission also has the power to identify, hold liable and punish the individuals who direct the business of companies that contravene the Competition Act. Section 48 of the Act sets out that the persons who were in-charge of the conduct of the business of the concerned company or the directors, manager, secretary or other officers of the company may be held liable for anti-competitive acts of the company.[8] This provision is crafted in broad terms, it allows the Commission to impose penalties based on supporting evidence that the officers of the company knew of the contravention, or

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1 The Competition Act, 2002, preamble.

2 The Competition Act, 2002, S. 3; All such agreements are void.

3 The Competition Act, 2002, S. 2(*h*) for the meaning of enterprise. In general, "enterprise" includes any "person" that is engaged in the business in India and is indifferent to the how the person is organized. It includes individuals, as well as persons organized as companies, partnerships, limited liability partnerships, societies, etc.

4 The Competition Act, 2002, S. 4.

5 The Competition Act, 2002, S. 6.

6 The Competition Act, 2002, Ss. 27 and 31.

7 Or 10 per cent of the average turnover for each year that the cartel exists, whichever is higher.

8 It is worth noting that the explanation to S. 48 of the Competition Act provides that "company" means a body corporate and includes a firm or other association of individuals; and a "director", in relation to a firm, means a partner in the firm. For example, see *Kerala Cine Exhibitors Assn.* v. *Kerala Film Exhibitors Federation*, 2015 SCC OnLine CCI 98. As such, references to "companies" in this paper should be read in light of the above explanation.

if such contravention was committed with the consent or connivance or was attributable to the negligence of such officers. This is in consonance with the general corporate principle that, in appropriate cases, the individuals of the company are equally liable for the acts of the company. To impose liability on only the company, but not the individuals responsible for the acts of the company would leave such individuals to continue to damage the interests of competitive markets.[9]

The Commission can exercise this power by initiating proceedings under Section 26 under which the Commission may call upon its Director-General to investigate alleged anti-competitive practices and prepare a report of the investigation. If such report finds that there has been a contravention of the Competition Act, the Commission can make further inquiry into the matter to determine whether or not a violation of the Competition Act has been committed.[10] Unfortunately, in some cases, the Commission and the Director-General have imposed liability on officers and employees of companies without taking due consideration of the role played by such individuals. In these cases, the COMPAT has observed that the enforcement of the Competition Act must be backed by a deep understanding of the facts and circumstances that promp the anti-competitive conduct. This is because a particular conduct could be appreciated under one circumstance and deprecated under another, and two opposite conducts could invite the same outcome.[11] In view of these dichotomous possibilities, there is a duty to prevent a false negative that may result if the individuals who direct the business of a company are not allowed to explain their conduct. The cost of such a false negative is high as it may deter efficient business.[12]

In the light of these issues, this paper analyses the jurisprudence under the Competition Act relating to individual liability, to determine whether the Commission has fulfilled its mandate. Part II sets forth the relevant provisions of the Competition Act and examines key procedural and evidentiary issues in such matters. These include matters of standard of proof, due process

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[9] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40, ¶ 32 (*Ministry* v. *Mahyco*).

[10] Upon consideration of the Director-General's report and submissions of the parties on this report, the Commission may send the report back for further investigation. If the report does not find a contravention, the Commission may proceed to close the matter, or conduct a further inquiry, as it deems fit. If the report finds a contravention, and the Commission agrees with such finding after hearing the parties concerned, the Commission may take action including passing a cease-and-desist orders and imposing appropriate penalties.

[11] For example, the Commission does not consider an unfair or discriminatory price by an enterprise illegal if it is adopted to meet competition; see *MCX Stock Exchange Ltd.* v. *National Stock Exchange of India Ltd.*, 2011 SCC OnLine CCI 41.

[12] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40, (*Supra* note 9).

and the scope of such investigations. Based on this review, this paper advocates that the Commission and its Director-General must make a conscious effort to investigate the actual role of the individuals who are alleged to hide behind the corporate form in such cases.[13] Based on these investigations, the Commission must only penalize individuals who are in fact involved in anti-competitive conduct, and at the same time, should not let culpable individuals go unpunished. Part III concludes that the Commission's enforcement and investigation methodology in cases of individual liability has been inconsistent and, at times, deficient. Therefore, to ensure fair and equitable enforcement of the anti-trust law, the Commission must thoroughly investigate the actual role and involvement of individuals involved in anti-competitive offences, and only take action based on sound evidence, adequate reasoning, and whilst observing the principles of natural justice.

II. INDIVIDUAL LIABILITY UNDER THE COMPETITION ACT

Section 48 of the Competition Act deals with individual liability in cases of contraventions by companies, and reads as follows:[14]

"Contravention by companies

48. (1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

> Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation,

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[13] *Ibid.*, ¶ 32. The Commission itself stated: "*no person can be condemned unheard. This is not rhetoric. This has to be followed in substance. This means that a person, who might be ultimately condemned, must have an effective opportunity to defend himself at the appropriate stage.*"

[14] A similar provision existed in the precursor to the Competition Act, 2002 that is the Monopolies and Restrictive Trade Practices Act, 1969 (*viz.* S. 53).

order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly."

Under Section 48(1), the Commission is required to identify the personnel in charge of, and responsible to the company for the conduct of the business of the company at the time of the contravention, and the burden lies on such person to rebut that the contravention took place without his/her knowledge or took place in spite of all due diligence to prevent such contravention. On the other hand, under Section 48(2), the burden of proof lies with the Commission and the Director-General to establish that the director, manager, secretary or other officer consented to, connived or acted in a negligent manner in respect of the contravention. As such, while Section 48(1) of the Competition Act imposes individual liability on the basis of the position of responsibility held by an official(s), Section 48(2) of the Competition Act requires evidence of active participation of such director, officer, secretary or manager in relation to the anti-competitive conduct.

This provision has been in effect since May 20, 2009.[15] Despite this, individual liability only started to take shape in 2013. In *Santuka Associates (P) Ltd.* v. *All India Organization of Chemists and Druggists Assn.*,[16] the Commission attributed individual liability to the office bearers of trade associations in the pharmaceutical industry. Thereafter, in *Prasar Bharati* v. *TAM Media Research (P) Ltd.*[17], the Commission ordered that if the Director-General finds a contravention against the respondent company, the Director-General shall also investigate the role of the individuals behind such contravention under §48. Despite this, the first instance of penalties being imposed on officers arose in 2014 in *Bengal Chemist & Druggists Assn.* v. *Competition Commission of India*.[18] In this case, the Commission imposed a penalty of INR 18.38 crores, the majority of which was borne by the office

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[15] This provision was in the Competition Act, as enacted. However, the provisions relating to anti-competitive agreements and abuse of dominance only came into effect on 20 May 2009; *See* MCA Notification No. S.O. 1241(E) dated 15 May 2009 (w.e.f. 20 May 2009) and MCA Notification No. S.O. 1242(E) dated 15 May 2009 (w.e.f. 20 May 2009)

[16] 2013 SCC OnLine CCI 16.

[17] 2016 SCC OnLine CCI 15.

[18] 2016 SCC OnLine Comp AT 421; See also *Indian Sugar Mills Assn.* v. *Indian Jute Mills Assn.*, 2014 SCC OnLine CCI 141; *Rohit Medical Store* v. *Macleods Pharmaceutical Ltd.*, 2013 SCC OnLine CCI 29; *P.K. Krishnan* v. *Paul Madavana*, 2015 SCC OnLine CCI 186; Piyush Gupta *et al.*, "India: Individual Culpability: Liability of Directors & Officers under the Indian Competition Regime" (Mondaq, 15 September 2016) <http://www.mondaq.com/india/x/525380/

bearers and executive committee members.[19] Notably, the Commission levied individual penalties at differential rates based on the extent of their roles in the anti-competitive conduct. The office bearers were subjected to a fine of 10 per cent of their average income for the three preceding years, while the executive committee members were subjected to a penalty at a lesser rate of 7 per cent.

III. Sequencing of Identification of Liability

In the course of this jurisprudential development, the Commission and appellate bodies were grappled with a procedural question, i.e., whether officers can be held guilty before (or concurrently) with the company? If not, was it necessary to first find the company guilty before proceeding against its officers? A plain reading of the relevant provisions of the Competition Act suggests that the Commission must find a contravention against a company before it can go on to attributing personal liability to its officers or employees. However, the Delhi High Court in *Pran Mehra* v. *Competition Commission of India*[20] ("*Pran Mehra* v. *Commission*") held that there cannot be two separate proceedings in respect of the company and its officers. Following the inquiry made under Section 26, a finding of contravention has to be recorded against the company and its officers are to be probed, however not necessarily in a particular order.[21] The Court found that the scheme of the Competition Act did not contemplate such separate proceedings, which would be both '*inefficacious and inexpedient*'.

This decision was rendered in February 2015. Notwithstanding the decision of Delhi High Court, the erstwhile Competition Appellate Tribunal (COMPAT) in two decisions delivered in April-May 2016 viz., *A.N. Mohana Kurup* v. *Competition Commission of India*.[22] ("*Mohana* v. *Commission*")

Directors+Officers/Individual+Culpability+Liability+Of+Directors+Officers+Under+The+Indian+Competition+Regime> accessed 5 February 2018.

19 On account of entering into anti-competitive agreements with pharmaceutical companies.

20 2015 SCC OnLine Del 7929.

21 In *Aneeta Hada* v. *Godfather Travels and Tours (P) Ltd.,* (2012) 5 SCC 661, the Supreme Court did hold that the company has to also be prosecuted along with its officers, to the effect that its prosecution becomes a condition precedent to vicarious liability of the officers. (Furthermore, there was no ground to establish that there was a sequence to the prosecution, with the company being held liable first, and the Court then proceeding against the officer-in-charge responsible for the conduct of the company).

22 2016 SCC OnLine Comp AT 33, ¶ 29; *cf.* Prasar Bharati v. TAM Media Research (P) Ltd., 2016 SCC OnLine CCI 15 (The Commission holding in 2012 that if the Director-General finds a contravention against a company, the Director-General shall also investigate the role of the individuals behind such contraventions under Section 48).

and *Alkem Laboratories Ltd.* v. *Competition Commission of India*[23] ("*Alkem* v. *Commission*"), has held that finding contravention by the company is a pre-requisite before commencing proceedings against individuals.[24]

The COMPAT held that Section 48 is an *ex post* clause which can be invoked only after it has been found that the company has contravened the provisions of the Competition Act. No director, manager, secretary or other officer of the company can be penalized under these sections unless the company has itself been found in contravention of the provisions of the Competition Act. The COMPAT in *Alkem* v. *Commission* relied on the Supreme Court decision in *Aneeta Hada* v. *Godfather Travels and Tours (P) Ltd.*,[25] where the Court had held that liability can attach to persons in charge of the company only after a charge is framed and a finding of contravention is made against such charge under the *pari materia* provision in the Negotiable Instruments Act, 1881.[26]

In July 2016, the Commission, in *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*[27] ("*Ministry* v. *Mahyco*"), held that *Mohana* v. *Commission* and *Alkem* v. *Commission* could not be taken as binding precedents. The applicants in *Ministry* v. *Mahyco* had relied heavily on these orders to argue that the Commission must find that a contravention has been committed by a company before it could issue directions to the Director-General to investigate the role of the officers of the company. Instead, the Commission applied the reasoning of *Pran Mehra* v. *Commission* and other similar decisions under *pari materia* provisions[28]

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[23] 2016 SCC OnLine Comp AT 101, ¶ 65.

[24] In *Alkem Laboratories Ltd.* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, the COMPAT held that S. 48 requires strict construction and more importantly, that the deeming provisions in S. 48 can only be invoked after the Commission finds that a company has committed a contravention. It noted that the legislature had used the term "committed" in these sub-sections, necessarily implying that some competent authority must make an affirmative finding against the company before its officers can be proceeded against and punished; the scheme of the Competition Act only permits the Commission (and not the Director-General) to make such a finding; *ibid.*, ¶ 64.

[25] (2012) 5 SCC 661, ¶ 34.

[26] The Negotiable Instruments Act, 1881, S. 141.

[27] 2016 SCC OnLine CCI 40; In this case, the Commission received information from various informants such as Ministry of Agriculture and Farmers Welfare, National Seeds Association of India, Department of Agriculture and Cooperation, and the State of Telangana, alleging anti-competitive practices by the respondents. The Commission passed a *prima facie* order against Monsanto under S. 26(1) directing the Director-General to investigate the matter and the individuals responsible for the alleged anti-competitive conduct. The opposite parties filed an interim application challenging this order and contended that the investigation against the individuals could not be undertaken at a preliminary stage, prior to finding a contravention against the company.

[28] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40, ¶¶ 31, 32; the Commission also referred to a significant number of judgments under different statutes where the Courts have proceeded against

to hold that a company and its officers can be investigated simultaneously. However, the Commission did clarify that even in such simultaneous proceedings, a finding has to be recorded against the company before investigating individual liability though both findings can be in one single order. In sum, the Commission held that the Director-General must investigate the entire matter, which necessarily includes investigating the role of all persons behind the conduct of the company.[29]

The Kerala High Court in a recent decision also endorsed this position of law. In *Unnikrishnan* v. *Competition Commission of India*,[30] it held that the scheme of the Competition Act does not contemplate two separate proceedings against the opposite parties and its office bearers. A proceeding under Section 48 is a "*composite one*" and "as such, the guilt, if any, of the persons who come under Section 48 of the Act also needs to be examined simultaneous to the guilt of the company". Therefore, there is divergence of judicial opinion between the COMPAT and High Courts. However, the decisions of the Delhi and Kerala High Court are more pragmatic. Aside from procedural benefits to the individual, there is no prejudice caused to such person. An investigation by itself does not adversely affect the person being investigated, and no consequences flow from simply from an order to investigate the involvement of an individual.[31] In fact, this would allow such individuals to plead and demonstrate that the company was not liable in the first place.[32] Further, this decision is aligned with *Mohana* v. *Commission* and *Alkem* v. *Commission* in recognizing the principle that an individual cannot be held severally liable, or liable prior to making a similar finding against the company, and *Pran Mehra* v. *Commission* simply allows this to happen simultaneously and streamlines the existing procedure.

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the company and the officers-in-charge simultaneously; See *Vasu Tech Ltd.* v. *Ratna Commercial Enterprises Ltd.*, 2008 SCC OnLine Del 524: (2009) 160 DLT 591; *Dilip S. Dhanukar* v. *Air Force Group Insurance Society,* 2007 SCC OnIine Del 12: ILR (2007) 1 Del 234; *Satyapal Talwar* v. *State (Govt. of NCT of Delhi),* 2011 SCC OnLine Del 1559; *Sushila Devi* v. *SEBI,* 2007 SCC OnLine Del 1081 : (2008) 1 Comp LJ 155; *Shailendra Swarup* v. *Enforcement Directorate,* 2009 SCC OnLine Del 3724: (2011) 162 Comp Cas 346; *Aneeta Hada* v. *Godfather Travels and Tours (P) Ltd.*, (2012) 5 SCC 661.

[29] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40 , ¶ 35; This order was challenged before the High Court of Delhi in *Monsanto* Co. v. *Competition Commission of India*, Writ Petition (Civil) No. 7578 of 2016, decided on 12-10-2018 (Del) and *Mahyco Monsanto Biotech (India) (P) Ltd.* v. *Competition Commission of India*, Writ Petition (Civil) No. 7583 of 2016, decided on 12-10-2018 (Del).

[30] (2016) 4 KLT 395.

[31] *Bhoruka Financial Services Ltd.* v. *SEBI*, 2006 SCC OnLine SAT 163.

[32] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40 , ¶ 34.

In view of the above, the Commission may direct the Director-General to concurrently investigate anti-trust contraventions and determine the extent of individual liability of the officers and employees concerned if it is of the opinion that a *prima facie* case exists.[33] Acting on such order, the Director-General shall investigate the matter and prepare its report.[34] In such cases, the Director-General must issue action-oriented notices to the individuals under investigation, and these notices should clearly put the individual on notice to demonstrate why such individual should not be found liable under Section 48 of the Competition Act.[35] After considering the submissions of such individuals (if any), the Director-General may identify whether such individuals were in charge of or responsible for conducting the affairs of the company being investigated. Based on this report, the Commission issues show cause notices to such persons requiring them to make their submissions against the Director-General's report.[36]

IV. STANDARD OF PROOF

The Commission seems to rely solely (or at least heavily) on the assigned roles or designations of individuals under Section 48. It does not appear to consider, or rather side-steps the question of whether the individuals consented to or connived in the contravention, or whether the contravention is attributable to their neglect. Ostensibly, the Commission proceeds on the wide language of sub-section (1) of Section 48. In this regard, the Director-General and the Commission has not duly investigated the involvement of these individuals. They have also not appreciated that the intent of such 'Offence/ Contravention by companies' clauses, is to punish only those individuals that had a role to play in the incriminating act, or those who had knowledge of the act; in other words, persons who had nothing to do with

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[33] The Competition Act 2002, S. 26(1); It can do so suo motu, or on the receipt of a reference from a governmental or statutory authority or based on information received from an informant under Section 19:

Provided that if the subject-matter of information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

[34] The Competition Act, 2002, S. 26(3).

[35] See *BCCI* v. *Competition Commission of India,* 2014 SCC OnLine Comp AT 103 and *Interglobe Aviation Ltd.* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 87 for judicial precedent on "action-oriented notices".

[36] In these show-cause notices, the Director-General also calls for the income tax returns of the relevant individuals for the three financial years preceding the contravention. Similar to the provisions on penalty on enterprises having regard to their average turnover, in case of individuals, the CCI determines the penalty on individuals on the basis of their average annual income.

the matter need not be roped in.[37] In such cases, clear and cogent evidence is required to establish an offence.[38] A person cannot be said to be in charge of the business of the company merely because he is a director or manager of the company; it is possible that such officers may be in charge of one part of the business but not the other part from which the contravention arises. In other words, persons who are considered under corporate law to conduct the business of a company, for example, directors, must also *de facto* have charge of the business of the company and should be held liable.[39] Therefore, individual liability should be linked to the *de facto* role played by the individual in question in the affairs of a company and not his designation or status. If being a director, manager or secretary was enough by itself to cast liability, the Competition Act would (or should) have said so.[40]

These principles should apply to investigations under Section 48 of the Competition Act.[41] This was noted by the COMPAT in *Alkem* v.

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[37] See *S.M.S. Pharmaceutical Ltd.* v. *Neeta Bhalla,* (2005) 8 SCC 89, ¶ 5 (With regard to S. 141 r/w the Negotiable Instruments Act, 1881, S. 138 stating "*The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.*")

[38] See *K.K. Ahuja* v. *V.K. Vora,* (2009) 10 SCC 48, ¶ 11 (referring to *K. Srikanth Singh* v. *North East Securities Ltd.*, (2007) 12 SCC 788, ¶ 5) (The mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under S. 141 of the Negotiable Instruments Act).

[39] See *Girdhari Lal Gupta* v. *D.N. Mehta,* (1971) 3 SCC 189 : (1971) 3 SCR 748; *State of Karnataka* v. *Pratap Chand,* (1981) 2 SCC 335 : 1981 Cri LJ 595; *Katta Sujatha* v. *Fertilizers & Chemicals Travancore Ltd.,* (2002) 7 SCC 655; *Swapan Kumar Karak* v. *Competition Commission of India,* 2015 SCC OnLine Comp AT 939 (The person must actually be associated with the contravention, for the Commission to hold such person liable).

[40] *See S.M.S. Pharmaceutical Ltd.* v. *Neeta Bhalla,* (2005) 8 SCC 89 (The Supreme Court stated that if being a director, manager or secretary was enough to cast criminal liability, S. 141 of the Negotiable Instruments Act, 1881 would have said so. The Court also stated that the legislature is aware that it is a case of criminal liability, which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.) S. 48(2) institutes a two-pronged test to attribute liability. The first is to identify the designation of a director, manager, secretary or officer, and the second is to link the contravention committed by the company to the consent, connivance or negligence of such person.

[41] These principles have evolved in the context of other *pari materia* provisions. In this regard, the Commission and the COMPAT have consistently relied on judgements under such provisions; *for example, Alkem Laboratories Ltd.* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, ¶ 68 (holding that the decision of the Supreme Court in *T.N. Electricity Board* v. *Rasipuram Textile (P) Ltd.*, (2008) 17 SCC 285 squarely applied to *Alkem Laboratories Ltd.* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101).

Commission.[42] In this case, the Commission initiated investigation into the officers of the Company at the threshold, that is, under Section 26(1) of the Competition Act. The Joint Director-General framed issues which did not contain any indication that the appellants were also to be investigated. The informant[43] in this case did not aver, allege or lead evidence to prove that the officers of the Company were in-charge of, and were responsible to Alkem Laboratories Limited (Alkem) for the conduct of its business. The Joint Director-General recorded a finding that Alkem had engaged in anti-competitive practices, but did not return a similar finding against the officers of Alkem. Nevertheless, Alkem officers were held liable under Section 48.

None of these facts supported the Commission's finding against the officers of the Company. Therefore, and specifically since no evidence was collected by the Joint Director-General against the officers of Alkem, the COMPAT found that the Commission had casually held them guilty under Section 48(1) of the Competition Act. This was found to be *ex facie* contrary to the law laid down by the Supreme Court in *T.N. Electricity Board* v. *Rasipuram Textile (P) Ltd*.[44] In this case, the Supreme Court interpreted a *pari materia* provision to hold that the burden of proof lies on the complainant; this burden only shifts to the officers if the complainant establishes by evidence that such officers were, in fact,[45] in-charge of, and responsible for the company's business.[46] Therefore, up to this point, there was no need to refer to the proviso to such provisions that allows such individuals to prove that the offence was not committed with their knowledge or that they

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[42] *Alkem Laboratories Ltd*. v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, ¶ 65.

[43] *See* Information filed by P.K. Krishnan, Proprietor, Vinayaka Pharma dated 31 March 2014 under Section 19(1)(*a*) of the Competition Act.

[44] (2008) 17 SCC 285; *Alkem Laboratories Ltd*. v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, ¶ 67.

[45] *Cf. Girdhari Lal Gupta* v. *D.H. Mehta,* (1971) 3 SCC 189: (1971) 3 SCR 748; *State of Karnataka* v. *Pratap Chand*, (1981) 2 SCC 335: 1981 Cri LJ 595; *Katta Sujatha* v. *Fertilisers & Chemicals Travancore Ltd*., (2002) 7 SCC 655 (holding that being a person *de jure* in charge of, and responsible for, the business of a company under corporate law is not sufficient and must be backed by *de facto* proof); *Alkem Laboratories Ltd*. v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101 goes slightly beyond these cases, in that there is no need to present a defense at all, unless the Commission discharges its burden to prove that individuals were in *de facto* control of the company, similar to criminal procedure. If however, the Commission discharges this burden, such individuals always have the escape carve-outs in contained in S. 48 to prove that they did not know or consent to the offending act, or took due-diligence to prevent it. To this extent, S. 48 r/w S. 26 provides an in-built multi-tiered defense to individuals to escape liability under the Competition Act.

[46] In cases initiated on the basis of information provided by an informant, the informant does not play the role of a "complainant" *per se*. Therefore, the burden of proof in such cases lies with the Commission.

undertook due-diligence to prevent it.[47] In view of the above, the COMPAT held that the Commission had gravely erred in passing an order without any valid grounds or evidence in its support. The error was patent to the point where even a person of ordinary prudence would not have recorded such a finding.[48]

Further, it is also important to note the Haryana Cartel case.[49] Despite the Commission finding evidence of the involvement of officers[50] and primarily using this evidence to implicate the companies involved, the Commission did not proceed against such officers under Section 48 merely on the ground that the Director General had not undertaken a specific investigation into the actual role played by such individuals (except recording the designation of such individuals and noting briefly their work profile based on their respective statements). The Commission ought to have exercised its powers under Section 26(7) of the Competition Act and should have directed the Director General to conduct a further investigation in the matter.

V. PROCEDURAL IRREGULARITIES

In conducting investigations under the Competition Act, the Director-General possesses wide powers of a Civil Court in respect of matters such as summoning and enforcing the attendance of any person, examining him on oath, receiving evidence on affidavit, etc. These are commensurate with the powers bestowed upon the Commission in Section 36(2) of the Competition Act.[51] Despite possessing such wide powers, there have been instances where the Director-General has not provided an opportunity to the officers of the company to present their case. The Commission's practice of granting such opportunities in earlier cases[52] confirms this right, though this amounts

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[47] *Alkem Laboratories Ltd.* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, ¶¶ 66-67.

[48] *Ibid.* at ¶ 29.

[49] *Director, Supplies & Disposals* v. *Shree Cement Ltd.*, 2017 SCC OnLine CCI 2.

[50] The officers in question were regional heads of the various cement companies, who allegedly had the decision-making power to submit the bids in response to the tender invited by the Haryana Government. These officers allegedly coordinated with each other before submitting the bids of their respective companies, by way of a series of calls. This was noted by the Director-General in his investigation report based on their call detail records.

[51] The Competition Act, 2002, S. 41(2) r/w S. 36(2).

[52] See *Chemists & Druggists Assn.* v. *Competition Commission of India*, 2015 SCC OnLine Comp AT 1022; In this case, the Commission directed the Director-General to issue notices in terms of S. 48(2) of the Competition Act, and give the office-bearers an opportunity to explain their role in the decision-making in respect of the practices which were found anti-competitive; *Swapan Kumar Karak* v. *Competition Commission of India,* 2015 SCC OnLine Comp AT 939; In this case, the Director-General was directed by the Commission

to a denial of the natural justice on first principles alone.[53] In support, the COMPAT in *Alkem* v. *Commission* noted two key mistakes:

> *first*, the Jt. Director-General failed to grant the right to present a defense to the individuals being investigated, though the complainant was given an opportunity to present his case;
>
> *secondly*, such individuals were not given an opportunity to cross-examine the complainant who was found to have made false and unfounded statements in his complaint.[54]

It should be noted that the Commission did provide a technical right to the individuals being investigated to present their case, in that such officers were provided copies of the Jt. Director-General report and were given the right to make submissions against the report. However, the meeting of the Commission in which it ordered that such copies were to be provided and the Jt. Director-General's report gave these individuals "*not even a whisper*" that they were being probed under Section 48(1) of the Competition Act. This resulted in a violation of the principle of natural justice, i.e., *audi alteram partem*, which rendered the penalty null.[55] The Commission itself in *Ministry* v. *Mahyco* categorically endorsed this principle; it stated that the principle that '*no person can be condemned unheard*' is not a mere rhetoric; it has to be followed in substance by providing an effective opportunity to

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to issue notices to the office-bearers of Bengal Chemist and Druggist Association (BCDA) giving them an opportunity to prove that the contravention by BCDA was committed without his knowledge or that he exercised all due-diligence to prevent the commission of such contravention. Further, the COMPAT in this case had observed that "*if the appellant was not associated with the offending decision, then the Commission could not have penalized him under Section 27 read with Section 48(1) of the Act*".

[53] *See* The Competition Act 2002, S. 36(1) ["*36(1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.*"]; See also *Interglobe Aviation Ltd*. v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 87, ¶ 33. The Commission was duty bound to comply within view of the mandate of S. 36(1) of the Act.

[54] *Alkem Laboratories Ltd*. v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 101, ¶ 70.

[55] *Ibid*., ¶ 71; Even otherwise, the appellant company was absolved by COMPAT in this appeal and on this ground alone, the officers would have been discharged; See also *State of Orissa* v. *Binapani Dei,* AIR 1967 SC 1269, ¶ 13 (rules of natural justice apply alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences.); *A.K. Kraipak* v. *Union of India,* (1969) 2 SCC 262, ¶ 21(rules of natural justice apply to both quasi-judicial enquiries as well as administrative enquiries.)

present a defense.[56] Furthermore, this defense is to be provided at the very threshold.[57]

In the same vein, a Division Bench of the Delhi High Court in *Google Inc.* v. *Competition Commission of India*[58] pointed out that the Director-General's powers of investigation are sweeping and wider than the powers conferred upon the police under the Code of Criminal Procedure, for example, the police does not have the power to record evidence on oath. Further, the Director-General can allow cross-examination of witnesses, which forms evidence recorded in Director-General's report, and which consequently forms the basis of further proceedings before the Commission. Therefore, due to the nature of these powers, the *audi alteram partem* rule must apply to these proceedings (though it may not apply to police investigations). Further, if a person is not given this right and the Director-General report is adverse, such person has been unfairly prejudiced and then it cannot be argued that no prejudice was caused by such procedure merely because the person has an opportunity to defend himself before the Commission.[59]

The Director-General must also provide the concerned individuals with an action-oriented notice, per *Mohana* v. *Commission*,[60] in this case the Commission passed on order imposing penalties on individuals allegedly involved in anti-trust offences (including an order not to associate the appellants with its affairs, including administration, management and governance for a period of two years albeit) without issuing an action-oriented notice and giving them opportunity of hearing. The counsel for the individuals submitted before the COMPAT that this order was vitiated on account of a breach of principles of natural justice. One of the breaches cited by the counsel was that the Commission did not provide adequate notice to the relevant individuals to show cause against imposition of penalties as the

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[56] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40 , ¶ 33.

[57] *Ibid.*, ¶ 34.

[58] 2015 SCC OnLine Del 8992.

[59] See also *Blaze and Central (P) Ltd.* v. *Union of India,* 1980 SCC OnLine Kar 99 : AIR 1980 Kar 186 ["*...if the right to be heard is to be a real right which is worth anything, it must carry with it a right to know the evidence of the opposite side. The (petitioner) must therefore be told what evidence has been given or what statements have been made by the opposite side. In other words, to put it shortly, the (petitioner) must be given a fair opportunity to correct or contradict the statements recorded or the evidence collected in his presence or absence.*"]

[60] See also *Kerala Film Exhibitors Federation* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 298, ¶ 25; *Shib Shankar Nag Sarkar* v. *Competition Commission of India*, 2016 SCC OnLine Comp AT 275, ¶ 19 (In this case, the COMPAT set aside a penalty on the ground that the Commission did not provide the appellants with a copy of the main investigation report; this caused the appellants serious prejudice by depriving them of an effective opportunity to contest the findings).

Commission only directed electronic copies to be supplied to the opposite parties and the relevant individuals to enable them to "file their suggestions/ objections". The counsel for the Commission resisted this submission, and requested the Tribunal to refuse to interfere with the order on a "hyper-technical ground of violation of the principles of natural justice" since the Jt. Director-General had given ample opportunity to the appellants to defend themselves and which the appellants did not avail of.[61] The COMPAT held that the Commission did not give any notice or opportunity of hearing to the appellants.[62]

The COMPAT also applied a similar line of reasoning in *Interglobe Aviation Ltd.* v. *Competition Commission of India*.[63] It noted the decision of the Supreme Court in *Gorkha Security Services* v. *State (NCT of Delhi)*[64] which had stated:

> "21. ... The fundamental purpose behind the serving of show-cause Notice is to make the individual understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained.
>
> 22. ... [I]t is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:
>
> (i) The material/grounds to be stated which according to the department necessitates an action;
>
> (ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

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61 *Ibid.*, ¶¶ 20-21.
62 *Ibid.*, ¶¶ 38-41.
63 2016 SCC OnLine Comp AT 87, 2016; See also *BCCI* v. *Competition Commission of India*, 2015 SCC OnLine Comp AT 238.
64 (2014) 9 SCC 105, ¶ 21.

> We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

Against the backdrop of this decision, the COMPAT found that the Commission ought to have indicated to the appellants that the Commission had disagreed with the clean chit given by the Director-General. Having considered the Director-General's report, the Commission passed a 'usual order' directing the supply of copies of the report to enable them to file their replies/objections; it did not contain any indication that the Commission had disagreed with the report. Even at the stage of oral hearing, the Commission did not give any such indication, or call upon the appellants to show cause against a finding of contravention. Therefore, no opportunity was given to show that the reasons for disagreement were untenable, which was a clear breach of the principles of natural justice.[65]

The position of the COMPAT on these issues is well summarized in *Sunil Bansal* v. *Jaiprakash Associates Ltd*.[66] as follows:

> "In [the] last few years, this Tribunal has noticed that the Commission has passed several orders in complete disregard to the law laid down by the Supreme Court that while exercising adjudicatory functions, the Commission acts as a quasi-judicial body and it is bound to act in consonance with different dimensions of the principles of natural justice. The Commission has also not realised that as a quasi-judicial body, it is subordinate to the Tribunal established under Section 53A and is bound to follow the law laid down by the Tribunal on the interpretation of the provisions of the Act and the Regulations. It is high time for the Commission to realise that by enacting Section 36(1), Parliament has unequivocally declared that in the discharge of its functions, the Commission shall be guided by the principles of natural justice. The Commission should also take cognizance of the law laid down by the Tribunal, the High Courts and the Supreme Court. Any delay in this regard will only add to unnecessary litigations in the form of appeal under Section 53B(2) of the Act and further appeals under Section 53T of the Act and also petitions under Articles 226 and 227 of the Constitution."

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[65] *Interglobe* (*supra* note 63), ¶¶ 32-34.
[66] 2016 SCC OnLine Comp AT 391, ¶ 46.

VI. SCOPE OF INVESTIGATION

The Commission has held that the investigation caused to be made under Section 26, is an investigation into the 'matter'. There is no suffix, no prefix, no *proviso*, no explanation, and no caveats of any form attached to the word 'matter', which *ipso facto* means that the Director-General needs to investigate into the matter comprehensively in all its dimensions. The Commission has also in certain cases specifically directed the Director-General to investigate the role of the officers of the company.[67]

Given the unique nature of anti-trust offences, especially in the case of cartels, it may not be easy to identify individual liability. The Commission also recognized that conduct that may be considered anti-competitive in one case may not be so in another case. As such, the Director-General and the Commission must carefully and consciously examine the facts, circumstances and evidence on record, in addition to providing an effective opportunity for defense. In this regard, reports of the Director-General commonly impute liability merely because a certain person was marked a copy of incriminating e-mails. Such a person may be marked on e-mails simply as a matter of practice, and may not actually be involved in the commission of the offence.[68] Similarly, in *Alkem* v. *Commission*, individuals were held liable simply due to them holding "*key positions*" in a company. Eventually, the COMPAT rejected the order and held that simply because the appellants wrote a letter to the pharmaceutical company to appoint the complainant as stockist is not sufficient proof.

In this regard, it should be noted that section 48 provides two lines of defense; first, the individual must be de jure in charge of, or responsible for, the conduct of the business of the company. The second line of defense is added by judicial precedent i.e., liability cannot be imputed unless such

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[67] *Ministry of Agriculture and Farmers Welfare* v. *Mahyco Monsanto Biotech (India) Ltd.*, 2016 SCC OnLine CCI 40 , ¶ 35; This had been stated by the Commission in Prasar Bharati v. TAM Media Research (P) Ltd., 2016 SCC OnLine CCI 15, though it was not assertive and did not express this requirement as a mandatory duty.

[68] It is worth noting that S. 48(2) of the Competition Act provides that where a contravention is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such person may be found liable with the company. Therefore, even if any such person is casually marked on e-mails, he/she should be careful where these e-mails demonstrate ex facie contraventions of the Competition Act. In such cases, even being casually marked on e-mails may be sufficient to demonstrate neglect on the part of such persons. In such cases, it is advisable for such persons to expressly record dissent with such practices, by responding to such e-mails stating that the same is against company anti-trust policy or escalating the matter to the relevant compliance teams. Also, in *Fx Enterprise Solutions India (P) Ltd.* v. *Hyundai Motor India Ltd.*, 2017 SCC OnLine CCI 26, the Commission considered the plea that the respondent had a competition law compliance programme in quantifying penalties.

persons are proved to be de facto in charge of the business of the company.[69] However, this does not mean that the de jure nature of such individuals should be disregarded for the purposes of the Competition Act. For example, while any director may be relieved from liability under Section 463 of the Companies Act, 2013 (Companies Act),[70] independent directors and non-executive directors can only be held liable if acts or omissions by a company occur with their knowledge and with their consent or connivance or where they have not acted diligently.[71] Further, in most cases, executive directors will probably be more culpable than non-executive directors who do not participate in the day-to-day functioning of the company. To this extent, all directors cannot be painted with the same brush.[72] Typically, directors are categorized as follows:

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[69] It is worth noting in this behalf that S. 166 of the Companies Act, 2013 requires directors to ensure the best interests of the company and its stakeholders', which could include anti-competitive practices, if viewed solely from the perspective of economic benefits. However, these interests must be balanced in a manner which ensures compliance with the Competition Act, in order to avoid individual liability under S. 48 of the Competition Act.

[70] This section provides that the Court may, in its discretion, relieve a director of liability arising from breaches of Companies Act, if the Court is satisfied that he has acted honestly and reasonably, having regard to all the circumstances of the case.

[71] The Companies Act, 2013, S. 149(12); and (in case of listed companies) the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, S. 25(5); This recognizes that independent directors and non-executive directors do not participate in the execution of the business of the company. Therefore, the liability of such directors for acts of the company is diluted on this count, in relation to the Companies Act, 2013. However, S. 149 r/w Sch. IV of the Companies Act presents a unique dichotomy in relation to anti-trust offences; this provides for certain additional duties for such directors, including reporting concerns with the running of the Company to the board, ensuring that such concerns are addressed, ascertaining and ensuring that the Company has an adequate and functional vigil mechanism and most importantly, to report concerns about unethical behaviour, actual or suspected fraud or violation of the Company's code of conduct or ethics policy. To this extent, such directors are made to act as a system of checks and balances and play a more supervisory role in the functioning of the company. This includes ensuring that the company does not engage in anti-competitive practices. As such, such directors may be derelict in their duties if they fail to take steps to prevent the company from committing cartelization offences.

[72] The Gujarat High Court adopted the same rationale in a case dealing with banking policy of the Reserve Bank of India and struck down a subordinate legislation that sought to impose liability on all directors equally, without considering if the director is involved in the day-to-day functioning of the company as an executive director or not (e.g. independent or nominee directors) and whether the act in question was within the control of such directors. In this case, a policy of the Reserve Bank of India specifically applied to all kinds of directors, regardless of the nature of their role or duties. In this regard, the Court undertook a detailed analysis of the various kinds of directors under the Companies Act, including shadow directors (who is not appointed to the Board, but on whose directions the Board is accustomed to act), de facto directors (who is not actually appointed as a Director, but acts as a Director and is held out by the company as such) and nominee directors. The Court also took into account the classification of directions under the Securities Contracts (Regulation) Act, 1956 and the listing agreements executed by listed companies with stock exchanges, thereunder. On the basis of these classifications, the Court held that all directors of a company cannot be held liable for a default in repayment of a loan by a company,

(i) Managing Director: The Managing Director is entrusted with substantial powers of management of affairs of the company and is in charge of and responsible for the management of the company.

(ii) Executive Directors: The executive directors are full-time directors of the company and are in charge of the affairs of the company under the supervision of the Managing Director.

(iii) Non-executive Directors: The non-executive directors attend and participate in board meetings and carry out other functions, but are not full-time directors. They are not responsible for the day-to-day business operations of the company.

(iv) Nominee directors: Nominee directors are appointed to the board of a company to represent the interests of the person making the nomination. The nominator may be given the right to nominate directors, for instance, by virtue of shareholder arrangements or lending arrangements with a shareholder or creditor.

(v) Independent Directors: Independent directors are apart from the Managing Director or executive and nominee directors. Such directors are usually appointed to bring relevant expertise and experience in relation to the business of the company, and are required to bring a level of impartiality and independence in decision-making in the board of directors.

Often, shareholders' agreements declare that nominee directors will not be identified (to the extent permitted by law) to be in-charge of and responsible for the business of the company. Further, directors may record objections with corporate actions and demonstrate that they were not involved in or consented to illegal acts of the company. For instance, in *Re Zylog Systems Limited*, two independent directors disclaimed liability arising out of a breach of law by Zylog Systems Limited (ZSL). These directors convinced the SEBI that they were not associated with the day-to-day operations of ZSL, and that the default occurred without their knowledge and consent. To do so, they brought board minutes on record before the SEBI where they promptly and diligently recorded their concerns with the breach. Soon thereafter, they resigned. The SEBI noted the importance of the role played by independent directors in guiding the management of companies

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which might be for varied reasons beyond the control of such directors. It does not distinguish between a director who is involved in the day-to-day functioning of a company as against those who are not. The circular paints all directors with the same brush. On this basis, the Court found that the policy, so far as it is sought to be made applicable to all the directors of the company, is arbitrary and unreasonable; See *Ionic Metalliks* v. *Union of India*, 2014 SCC OnLine Guj 10066.

and ensuring compliance with law, and found that these directors had performed this role with diligence. When the non-compliance came to their notice, they took "*strong stands*" to convince the board to comply with statutory obligations and when ZSL failed to do so, they resigned. On this basis, the SEBI did not take any action against these directors.[73]

In view of the above, the mere fact that a person was a director when the offence was committed by the company should not be enough to hold such person liable under Section 48. The Supreme Court clarified this in *National Small Industries Corpn. Ltd* v. *Harmeet Singh Paintal*[74] under the *pari materia* provision in the NI Act, holding:

> "...every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company, as well as the company. Merely being a director of the company in the absence of above factors will not make him liable..."[75]

In *S.M.S. Pharmaceutical Ltd.* v. *Neeta Bhalla*,[76] the Supreme Court took notice that there is a whole chapter in the Companies Act, 1956 on directors, of which sections 291 to 293 deal with the powers of the board. On a review of these provisions, the Court made some pertinent observations with respect to officers of a company: it found that the powers of directors depend upon the role and functions assigned to Directors under the memorandum and articles of association of the company. More importantly, it noticed that there is nothing which suggests that simply by being a director, a person is supposed to discharge particular functions or has knowledge of the day-to-day functioning of the company. Further, a director may attend only meetings of the board on policy matters and guide the course of business of a company. However, sub-committees or designates may be appointed to take on the day-to-day operations of the Company. Therefore, the role of a director in a company is a question of fact depending on the peculiar facts in each case. There are no universal rules in this regard, and it is the role of

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[73] *S. Rajagopal, In re,* 2017 SCC OnLine SEBI 40.

[74] (2010) 3 SCC 330.

[75] See also *S.M.S. Pharmaceuticals* v. *Neeta Bhalla,* (2005) 8 SCC 89 ("... liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable", etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.")

[76] *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla,* (2005) 8 SCC 89.

the person that matters and there are no magic designations like directors, managers, etc. which make a person liable. Further, the complaint[77] must disclose the necessary facts which make a person liable.[78]

These principles must be applied to anti-trust enforcement as well, especially with jurisprudence under the Competition Act already recognizing that liability depends on the role played by a person in the company and not merely on his designation or status. This also makes the converse possible i.e., a non-executive director (not ordinarily involved in the management of the company, but who was complicit in the anti-trust violation) may be proved to be actually liable. Consequently, a nuanced consideration of the *de jure* and *de facto* roles and functions should be considered by the Commission and the COMPAT. Differential standards ought to be adopted for different kinds of directors and employees, based on the true involvement and nature of functions performed by such persons. Furthermore, it must be recognized that culpability may not be evenly distributed even between employees at the same level; one officer may have committed a flagrant violation whereas another may have tacitly supported such person. For example, in *Kerala Cine Exhibitors Assn.* v. *Kerala Film Exhibitors Federation*,[79] the Commission penalized the Kerala Film Exhibitors Federation (KFEF) and the Film Distributors Association (Kerala) (FDA) for anti-competitive conduct in violation of Section 3(3)(b) of the Act for limiting the release of new movies to only 70 approved release centres in Kerala. It held that KFEF was the '*main perpetrator*' and that FDA "*had no option but to succumb to the diktats of KFEF to protect the commercial interest of its members*". Further, it noted that while FDA did succumb to the influence of KFEF, the fact that this was required to protect the commercial interests of its members was considered to be a mitigating factor, justifying a lesser penalty on FDA. Similarly, the officers of FDA were fined with a proportionately lesser amount than the officers of KFEF.

It is also important to note that the Commission in *Mohana* v. *Commission* directed office-bearers of a trade association, found to have engaged in the anti-competitive activity, to refrain from participating in the administration, management or governance of the association for a period of two years. The COMPAT held that the residuary clause in Section 27, i.e., Section 27(g)

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[77] *See* (*supra* note 10) on the nature of proceedings under the Competition Act.

[78] This stems from cheque-dishonour proceedings under the Negotiable Instruments Act, 1881 being adversarial, with a complainant and respondent on either side. Proceedings before the Commission and the Director-General can be initiated suo motu and therefore, this cannot apply verbatim. Nevertheless, there is principled rationale to apply this to suo motu initiated proceedings as well, to the end that the Director-General's report must be based on and present evidence against the individual under investigation.

[79] 2015 SCC OnLine CCI 98.

must be interpreted contextually and found that the Commission's direction was an unbridled exercise of power. It held that the Commission cannot issue an order or direction which would directly or indirectly impinge upon the provisions of other statutes. As such, while the Commission may impose a penalty on officers found to have engaged in anti-competitive activity, it cannot pass any direction asking them to refrain from holding their posts or from continuing to engage in the management of the enterprise.

VII. CONCLUSION

The Act casts strict obligations for anti-trust offences on corporates, as well as individuals, who direct the mind and will of these companies. These obligations, and the penalties that follow the contravention of these obligations, are intended to deter anti-trust practices. The deterrent value depends on the certainty of successful enforcement which has not been consistent, as demonstrated in this paper. The shortcomings in investigations conducted by the Commission and its Director-General, highlighted in this paper above, have resulted in several cases being overturned by the COMPAT. The Commission must therefore thoroughly investigate the actual role and involvement of the individuals, and enforce provisions of the Competition Act based only on sound evidence and adequate reasoning; critically, fundamental principles of natural justice and thorough investigative procedures must be observed. This will ensure fair and equitable enforcement of anti-trust law, failing which battles against cartels and abusive dominant enterprises may prove futile.