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INDIVIDUAL CULPABILITY: LIABILITY OF DIRECTORS & OFFICERS UNDER THE INDIAN COMPETITION REGIME

Piyush Gupta & Harshil Mehta***

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I. INTRODUCTION

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

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

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

This article provides an insight into the aspect of individual culpability under the Competition Act, 2002 ('Act') and the increasing trend of the

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¹ S. 166(2) of the Companies Act.

competition regulator to penalize the office bearers of companies, thereby making the decision-makers at companies, uneasy.

II. RELEVANT PROVISIONS UNDER THE ACT

Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of the Act is a company (including a firm or an association), *every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/association, shall be deemed to be guilty of the contravention* and shall be liable to be proceeded against and punished accordingly [emphasis added].

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

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

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

III. EMERGING JURISPRUDENCE ON PERSONAL LIABILITY OF D&O UNDER THE ACT

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

Then in 2012, in *Varca* case³, against the Chemists & Druggists Association of Goa (CDAG), it was opined by the CCI that “an association of enterprises cannot be considered as a company and therefore, the office

² Kapoor Glass (P) Ltd. v. Schott Glass India (P) Ltd., 2012 SCC OnLine CCI 17; GKB Hi-Tech Lenses (P) Ltd. v. Transitions Optical India (P) Ltd., 2012 SCC OnLine CCI 38.

³ Varca Druggist & Chemist v. Chemists & Duggists Assn., 2012 SCC OnLine CCI 41.

bearers of CDAG would not be covered under section 48 ... so no penalty is leviable on the office bearers”.

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

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

Up until 2013, even though the CCI had attributed liability on to office bearers of companies and associations, no penalties had been ascribed to them in any case. This trend buckled in 2014 when in *Bengal Chemist* case⁶ (which was investigated by the CCI in its *suo motu* capacity), the CCI not only held the Bengal Chemists and Druggists Association (BDCA) guilty for anti-competitive practices and penalized it, but also held the office bearers of the BDCA guilty under section 48 of the Act. To determine the penalty of the individuals, the CCI took into account, the income certificates of the concerned office bearers and imposed a cumulative penalty of INR 18.38 crores (of which, the penalty on BDCA was a mere INR 13.24 lakh). This decision was a breakthrough for the CCI, given that this was the first instance wherein penalties on individuals were imposed.

Similarly, the CCI found the office bearers of Indian Jute Mills Association to be vicariously liable and were penalized for their anti-competitive conduct in *Indian Jute Mills Assn.* case⁷ in latter half of 2014.

The issue of individual culpability and penalty has now been enshrined in the CCI's thought-process and decision-making. Thus, there is now no surprise when office bearers of entities, enterprises and associations, get penalized for their anti-competitive conduct on a more regular basis. For instance,

⁴ *Santuka Associates (P) Ltd. v. All India Organization of Chemists and Druggists*, 2013 SCC OnLine CCI 14.

⁵ *Prasar Bharti (Broadcasting Corpn. of India) v. TAM Media Research (P) Ltd.*, 2013 SCC OnLine CCI 23.

⁶ *Bengal Chemist and Druggist Assn., In re*, 2014 SCC OnLine CCI 38.

⁷ *Indian Sugar Mills Assn. v. Indian Jute Mills Assn.*, 2014 SCC OnLine CCI 141.

in *Macleods Pharma* case⁸ the president of the Himachal Pradesh Society of Chemists and Druggists Alliance was penalized. A similar approach was adopted by the CCI in *Alkem Laboratories* case⁹, where again, a DGM level individual, along with the Branch Manager and the Authorised Signatory of an association were held to be responsible owing to the “key positions” held by them and were fined in their individual capacities.

By the advent of 2015, the CCI evidently started broadening their focus and started targeting industries other than the pharmaceutical industry, but with the same ideology and methodology. For instance, the transport sector (*Shivam Enterprises* case¹⁰), the entertainment industry (*Kerala Cine Exhibitors* case¹¹) etc.

IV. CONCLUDING WORDS

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

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

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

In our considered opinion, this emerging jurisprudence could make decision-makers at companies uneasy, but it is actually a good thing from an

⁸ Rohit Medical Store v. Macleods Pharmaceutical Ltd., 2013 SCC OnLine CCI 29.

⁹ P.K. Krishnan v. Paul Madavana, 2015 SCC OnLine CCI 187.

¹⁰ Shivam Enterprises v. Kiratpur Sahib Truck Operators Coop. Transport Society Ltd., 2015 SCC OnLine CCI 27.

¹¹ Kerala Cine Exhibitors Assn. v. Kerala Film Exhibitors Federation, 2015 SCC OnLine CCI 98.

economic perspective as an organisation is eventually governed by its decision-makers. Proper enforcement and implementation of the competition laws in India will go a long way in attracting foreign investments into India as in any competitive economy/market, a potential investor will value a level playing field and assurances that the government will not accord unfair advantage to domestic players.

In addition to the above, penalizing individuals under the competition regime, will also bring India to the forefront amongst its South-East Asian neighbours, most of whom, have a competition law regime which entails penalizing D&Os under their respective statutes in order to curtail the competition law violations. A brief overview of the respective competition law legislations amongst the ASEAN nations on the case in point, is appended as Annexure A.

I. ANNEXURE A

Liability of individuals under the competition regime in ASEAN Countries

Country	Legislation	Liability of D&O
Thailand	Trade Competition Act, 2017 (w.e.f. October 2017); Trade Competition Act 1999	Section 54 of 1999 Act – “In the case where the person who commits an offence punishable under this Act is a juristic person, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or he or she has already taken reasonable action for preventing the commission of such offence from occurring.” Section 77 of 2017 Act – “Where an offender is a juristic person, if a commission of an offence of such juristic person is caused by an instruction or an act of a director or a manager or any person who is responsible for the business operation of such juristic person or where such person has the duty to give an instruction or act and did not give the instruction or did not act, which caused such juristic person to commit the offence, such person shall also be liable to the punishment as specified for such offence.”
Malaysia	Competition Act, 2010	Section 63 – “(1) If a body corporate commits an offence under this Act, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management— (a) may be charged severally or jointly in the same proceedings with the body corporate; and (b) if the body corporate is found to have committed the offence, shall be deemed to have committed that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves— (i) that the offence was committed without his knowledge, consent or connivance; and (ii) that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

Country	Legislation	Liability of D&O
		(2) If any person would be liable under this Act to any punishment or penalty for his act, omission, neglect or default, he shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any employee or agent of his, or of the employee of the agent, if the act, omission, neglect or default was committed— (a) by that person's employee in the course of his employment; (b) by the agent when acting on behalf of that person; or (c) by the employee of the agent in the course of his employment by the agent or otherwise on behalf of the agent acting on behalf of that person.
Myanmar	The Competition Act, 2015	Section 39 – “Any person who violates the prohibition contained in section 13 shall, on conviction, be punished with imprisonment for a term not exceeding three years or with a fine not exceeding one hundred and fifty lakhs Kyat or with both”. Section 40 – “Any businessman who violates the prohibitions contained in section 23, section 24 or section 29 shall, on conviction, be punished with imprisonment for a term not exceeding three years or with fine not exceeding Kyat one hundred and fifty lakhs or with both. Section 41 - “Any person who violates the prohibitions contained in section 15, section 19, section 22, section 26, section 27, section 31 or section 32 shall, on conviction, be punished with imprisonment for a term not exceeding two years or with fine not exceeding Kyat one hundred lakhs or with both.” Section 42 - “Any person who violates the prohibitions contained in section 18, section 20, section 21, section 25 or section 28 shall, on conviction, be punished with imprisonment for a term not exceeding one year or with fine not exceeding Kyat fifty lakhs or with both.” Section 43 - “Any person who fails without any concrete reason to apply to the request of the Investigation Committee to submit any evidence, document or financial evidence or to appear for the examination as witness for investigation under this Law shall be punished, on conviction, with imprisonment for a term not exceeding three months or with fine not exceeding Kyat one hundred thousand. Section 44 - “Notwithstanding contained in any existing law, the matters related to any provision contained in this law regarding competition shall be carried out by this Law”

Country	Legislation	Liability of D&O
Cambodia	Draft Law on Competition of Cambodia ¹²	Article 10 (Assisting Unlawful Activities) – “It is unlawful for any owner, director, officer, employee, or paid agent of a person to knowingly assist in activities of a person that are made unlawful by Articles 5, 6, 7 and 8.”
Brunei	Brunei Competition Order, 2015	Section 66 - If a body corporate commits an offence under this Order, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management (a) may be charged severally or jointly in the same proceedings with the body corporate; and (b) if the body corporate is found to have committed the offence, shall be deemed to have committed that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves - (i) that the offence was committed without his knowledge, consent or connivance; and (ii) that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence. 12) If any person would be liable under this Order to any punishment or penalty for his act, omission, neglect or default, he shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any employee or agent of his, or of the employee of the agent, if the act, omission, neglect or default was committed - (a) by that person’s employee in the course of his employment; (b) by the agent when acting on behalf of that person; or (c) by the employee of the agent in the course of his employment by the agent or otherwise on behalf of the agent acting on behalf of that person.

¹² Version 5.5 (7 March 2016) – Close to getting approved, “31 November, 2017 <http://www.khmertimeskh.com/5088630/ministry-commerce-nears-completion-competition-law/>” (The Competition Legislation cited above is close to getting approved in Cambodia).

Country	Legislation	Liability of D&O
Singapore	Competition Act, 2004	Section 81 – Offences by Body Corporate etc. – “(1) Where an offence under this Act committed by a body corporate is proved — (a) to have been committed with the consent or connivance of an officer; or (b) to be attributable to any neglect on his part, the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate. (3) Where an offence under this Act committed by a partnership is proved — (a) to have been committed with the consent or connivance of a partner; or (b) to be attributable to any neglect on his part, the partner as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (4) Where an offence under this Act committed by an unincorporated association (other than a partnership) is proved — (a) to have been committed with the consent or connivance of an officer of the unincorporated association or a member of its governing body; or (b) to be attributable to any neglect on his part, the officer or member as well as the unincorporated association shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (5) In this section — “officer” — (a) in relation to a body corporate, means any director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or (b) in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of a committee and includes any person purporting to act in any such capacity; “partner” includes a person purporting to act as a partner. (6) The Commission may, with the approval of the Minister, make regulations to provide for the application of any provision of this section, with such modifications as may be appropriate, to any body corporate or unincorporated association formed or recognised under the law of a territory outside Singapore.”

Country	Legislation	Liability of D&C
Philippines	The Philippine Competition Act, 2015	Section 30 - Criminal Penalties – “An entity that enters into any anti-competitive agreement as covered by Chapter III, Section 14(a) and 14(b) under this Act shall, for each and every violation, be penalized by imprisonment from two (2) to seven (7) years, and a fine of not less than Fifty Million Pesos (P50,000,000.00) but not more than Two Hundred Fifty Million Pesos (P250,000,000.00). The penalty of imprisonment shall be imposed upon the responsible officers, and directors of the entity. When the entities involved are juridical persons, the penalty of imprisonment shall be imposed on its officers, directors, or employees holding managerial positions, who are knowingly and wilfully responsible for such violation.”
Indonesia	Law of the Republic of Indonesia concerning the Ban on Monopolistic Practices and Business Competition, 1999	Section 47 – Administrative Sanctions on entrepreneurs, ¹³ Section 48 – Criminal Punishment Section 49 – Additional Criminal Punishment
Vietnam	Law on Competition, 2005	Article 118 – Level of fines for breach of laws on competition – “A body authorized to impose penalties may impose a fine up to no more than ten (10) per cent of the total turnover of the organization or <i>individual</i> in breach in the financial year preceding the year in which the prohibited practice took place ...” [emphasis added]

¹³ Art. 1 – Definition of Entrepreneur – “Entrepreneur is an individual person or a company, in the form of legal or non-legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in economic sector through contracts, both individually or collectively.”

Country	Legislation	Liability of D&O
Lao People's Democratic Republic	Law on Competition, 2015	Article 87 – Measures against violators – “Individuals, legal entities or organizations violating the Competition Law shall be educated, warned, disciplined, fined, subject to compensate for the damages or punished by relevant laws depending on the gravity of the violation.” Article 90 – Fine Measures – “Individuals, legal entities or organizations violating this Law, particularly the prohibitions which deemed as non-criminal offence shall be fined.” Article 91 – Civil Measures – “Individuals, legal entities or organizations violating the prohibitions under this Law which cause damages to other persons shall compensate for the actual caused damages.” Article 92 – Criminal Measures – “Individuals violating this Law which constituted as the criminal offence shall be punished in accordance with the Penal Law or other laws that provide criminal liability.”