LOCUS STANDI VIS-À-VIS NATURE OF THE COMPETITION ACT: AN ANALYSIS OF ITS CHANGING FRONTIERS

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ABSTRACT

The business community of India has evolved significantly over the years. Currently, India is witnessing the rise of a start-up culture leading to the formation and materialization of innovative ideas. The question, however, remains whether these start-ups can compete with the incumbents or die down if they ultimately choose not to be controlled by them. Competition law is crucial for the evolution of the market economy and thus, it is necessary that competition law paces itself with the changing business needs of the country.

*The judgment of the National Company Law Appellate Tribunal ["**NCLAT**"] in Samir Agrawal,[1] ["**Samir Agrawal case**"] created ripples of conceptual and legal uncertainties in the competition law fraternity. An information was filed by an independent law practitioner alleging that the two leading cab aggregators in India use algorithms to facilitate price fixing between the drivers. The information was dismissed by the Competition Commission of India ["**CCI**"] and an order[2] under Section 26(2) of the Competition Act, 2002 ["**Competition Act**"] was passed. The informant appealed against the said order before the NCLAT, and the Appellate Tribunal, while deciding the appeal,[3] took a rather conservative approach. The NCLAT dismissed the locus standi of the Appellant (i.e., the Informant) on the ground that the Informant did not suffer a direct legal injury from the alleged violation of provision(s) of the Competition Act. However, much has been settled by the recent judgment of the Supreme Court in Samir Agrawal* case,[4] *which overruled the conservative approach taken by the NCLAT in light of the nature of and intent behind the Competition Act.*

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[1] *Samir Agrawal v Competition Commission of India* Competition Appeal (AT) No.11 of 2019 (NCLAT).

[2] Case No. 37 of 2018 (CCI).

[3] *Samir Agrawal* (NCLAT) (n 1).

[4] *Samir Agrawal v Competition Commission of India* SCC Online SC 1024 (SC).

I. INTRODUCTION

"*Antitrust law isn't about protecting competing businesses from each other, it's about protecting competition itself on behalf of the public.*" - Al Franken

The date of July 24, 1991, marked the historic budget that had set the liberalisation, privatisation, and globalisation of Indian markets in motion by ending the license raj. The liberalisation of Indian economy necessitated a market which could provide a level playing field and an investor-friendly environment, and a market regulator which ensures the same. Consequently, the focus was required to be shifted from regulation of monopolies to promotion of competition amongst market players, by adequately preventing the abuse of a dominant market position. This was the very basis for introducing the Competition Act by replacing the erstwhile Monopolistic and Restrictive Trade Practices Act, 1969 ["**MRTP Act**"]. The then Finance Minister of India in his Budget Speech,[5] had stated "*The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a commission to examine this range of issues and propose a modern competition law suitable for our conditions.*"

The entire premise of the Competition Act is based on the objectives that it seeks to achieve. As enshrined in its Preamble, the Competition Act was introduced to prevent practices with an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade ["**Objectives of Competition Act**"]. To achieve these objectives, the CCI was established.

However, the NCLAT judgment in the *Samir Agrawal* case,[6] pronounced on May 29, 2020, created a sceptical disposition in the minds of the competition law fraternity *inter alia* regarding (i) the scope and objective of the Competition Act; (ii) the nature of competition law (i.e., law *in rem or* law *in personam*); (iii) the limitations of the Competition Act; (iv) the legislative intent behind the Competition Act, and keeping the same in mind, (v) the relevance of the *locus standi* of an Informant alleging a contravention of the Competition Act.

Before we proceed, it will be crucial to understand the significance held by 'law *in rem*' and 'law *in personam*'. The phrases '*in rem*' and '*in personam*' were always opposed to one another. The Supreme Court defines an act or proceeding *in personam* as one that is done or

[5]Shri Yashwant Sinha, 'Budget Speech 1999-2000' (*Parliament Digital Library*, 27 Feb 1999) <https://eparlib.nic.in/bitstream/123456789/123/1/Budget_speech_1999-2000.pdf> accessed 4 October 2020.
[6]*Samir Agrawal* (NCLAT) (n 1).

directed against or with reference to a specific person, while an act or proceeding *in rem* is one done or directed with reference to no specific person, and consequently against or with reference to all of whom it might concern, or all the world.[7] In light of the foregoing definitions, a statutory enactment may also be categorised as law *in personam* or law *in rem.* While the former is a statute which is enacted to either resolve the private conflicts between the parties (*for instance*, the Consumer Protection Act, 2019), the latter regulates a sector or an industry, in the interest of public at large (*for instance*, Securities and Exchange Board of India Act, 1992).

This article is an attempt to establish that the Competition Act is a law *in rem*, by analysing the current scheme and framework of the Competition Act, past precedents, and legislative intent, as encapsulated in the legislative documents. Recently, the Supreme Court, through its Judgment dated 15 December 2020,[8] affirmed our submission that Competition Act is in fact law *in rem* and attenuated the relevance of the 'direct legal injury' test as observed by the NCLAT in the *Samir Agarwal* case.[9] This article, however, seeks to address existing and future concerns arising out of (i) the narrow interpretation of '*locus standi*' of an Informant; (ii) treatment of Competition law as law *in personam*. Further, the article suggests the best possible way forward for the above-mentioned concerns, by analysing the practices followed in various international jurisdictions.

II. SCHEMES OF THE COMPETITION ACT

The Objectives of the Competition Act, as highlighted above, in itself indicates that the aim of the Competition Act is to regulate the market at large and is not restricted to the mere settlement of disputes between private parties. If the legislature intended to make the Competition Act legislation to resolve private conflicts, the Objectives of the Competition Act may not have been worded, as it exists today in the Preamble of the Competition Act. The Supreme Court in *Excel Crop Care Limited*,[10] also pointed out that "*the Competition Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved.*"

In addition to the objectives set forth in the Competition Act, the wordings of various provisions of the Competition Act read with the CCI (General) Regulations, 2009 ["**General Regulations**"] suggest that the Competition law is a law *in rem* and not a law *in personam*.

[7]Henry Campbell Black, *Black's Law Dictionary* (4th edn. West Publishing Co. 1951) 899.
[8]*Samir Agrawal* (SC) (n 4).
[9]*Samir Agrawal* (NCLAT) (n 1).
[10]*Excel Crop Care Limited v Competition Commission of India* [2017] 8 SCC 47 [22].

Section 19 of the Competition Act read with Regulations 10, 11, and 15 of General Regulations, deal with the filing of an 'information' and matters connected therewith. As seen in the next section, the above-mentioned provision read along with the relevant inter-related regulations, is broadly drafted to include any information, whether or not it invades the legal rights of the Informant. Further, Section 53N of the Competition Act, which deals with 'awarding compensation', provides a right to 'any enterprise or any person' to make an application to the NCLAT for seeking compensation that may arise from the findings of the Commission or the Appellate Tribunal. Evidently, Section 53N being much wider in its scope, is not restricted to providing compensation only to the Informant, but to anyone who is affected by the anti-competitive conduct of an enterprise.

Further, the observations of the CCI in the *Harshita Chawla v WhatsApp Inc*,[11] that "*the Competition Act has been conceived to follow an inquisitorial system wherein the CCI is expected to investigate cases involving competition issues in rem, rather than acting as a mere arbiter to ascertain facts and determine rights in personam arising out of rival claims between parties*", reinforces the broader mandate of the CCI. This finding is in line with the CCI's observations in the case of *XYZ v Indian Oil Corporation Limited*[12] that, "*a ruling/action by the CCI is a decision in rem and one which is intended to achieve market correction*".

III. CONTOURS OF SECTION 19 (FILING OF INFORMATION)

Section 19 of the Competition Act, allows the CCI to initiate an inquiry into an anti-competitive conduct (i) on receipt of any '*information'* accompanied with the required fees (Section 19 (1) (a)); (ii) on receipt of a reference made to it by the Central Government or a State Government or a statutory authority (Section 19(1) (b)); or (iii) on its own motion. A literal interpretation of the word 'any' in Section 19(1) (a) does not, in any way, portray a nexus between an informant filing an information under the Competition Act and the requirement of him suffering a direct legal injury.

Further, *"the use of the words 'any' connote extension. For 'any' is a word of wide meaning and prima facie the use of it excludes limitation."*[13] The Supreme Court, in the case of *Lucknow Development Authority v MK Gupta,*[14] elucidated the meaning of the word 'any' and while stating that the word has a wide amplitude, observed that, "*In Black's Law*

[11]Case No. 15 of 2020 (CCI) [50].
[12]Case No. 05 of 2018 (CCI).
[13]Justice G. P. Singh, *Principles of Statutory Interpretation* (13th edn, Lexis Nexus 2016) 179.
[14][1994] 1 SCC 243 [4] (SC).

Dictionary it is explained thus, the word "any" has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'same' or 'one' and it's meaning in a given statute depends upon the context and subject matter of the statute". This interpretation was further reiterated in the case of *Shri Balaganesan v. MN Shanmugham Chetty,*[15] wherein it was observed that "*the word any has one of the following meanings: some, one out of many, an indefinite number, one indiscriminately of whatever kind or quality. It further observed that it is synonymous with 'either', 'every' or 'all'.*"

Further, the General Regulations provide for other requisites of filing an information such as contents of information (Regulation 10), procedure for filing information (Regulation 12 and 13). Regulation 10 states that an information shall contain (a) a statement of facts; (b) details of the alleged contravention of the Competition Act and documents in its support thereof; (c) narrative in support of alleged contravention; (d) relief sought, if any; and (e) such other particulars which may be required by the CCI.[16] As is evident, proving an 'invasion of legal right' is not a pre-requisite to file an Information. Rather, the Informant has to show the contravention of the provisions of the Competition Act. Further, while claiming damages or relief can be seen as an integral part of private litigation. Regulation 10 has made seeking relief an optional claim, thus, indicating the non-private nature of the Competition Act.

Furthermore, Regulation 15 of the General Regulations which provides for the procedure of scrutiny of information does not highlight any criteria wherein an information filed maybe ousted on the mere ground that there is no invasion of the legal rights of the Informant. Moreover, Regulation 15 states, "*Nothing contained hereinabove shall preclude the CCI from using the contents of such information in any manner as may be deemed fit, for inquiring into any possible contravention of any provision of the Act*".[17] Thus, the CCI has reserved with itself the right to rely upon an information, irrespective of its validity, and act *suo-moto* upon it. However, this might not have been a popular option in private litigation.

Therefore, it is manifestly clear that the legislature intended to make the Competition Act a crucial instrument in regulating the market at large, and, not to resolve the limited issues between the Informant and the alleged party.

IV. THE COMPETITION ACT: LAW *IN REM* AND THE CONCEPT OF *LOCUS STANDI*

[15][1987] 2 SCC 707 [18] (SC).

[16]The Competition Commission of India (General) Regulations 2009, Reg. 10.

[17]The Competition Commission of India (General) Regulations 2009, Reg. 15.

The discussion on whether competition law is a law *in rem* or a law *in personam* stems from the recent judgment of the NCLAT in the *Samir Agrawal* case.[18] NCLAT ruled that an 'informant' in terms of Section 19(1) (a) of the Competition Act ought to be the one who has suffered an invasion of his legal rights as a consumer or a beneficiary of healthy competitive practices. Otherwise, a person would not have the *locus standi* to bring an action against a violator of the provisions of Competition Act. The Latin term '*locus standi*' means the 'place of standing'. The Supreme Court, while referring to the Concise Oxford English Dictionary, has held that the term '*locus standi*' refers to the right or capacity to bring an action or to appear in a court.[19] We believe that the *Samir Agrawal* case[20] has perturbed the settled design and object of the Competition Act.

The inevitable conclusion of this judgement seems to be that a person who has not suffered any legal injury as a direct consequence of an alleged contravention of the Competition Act is not entitled to furnish information before the CCI. Consequently, that legal injury is a pre-requisite to file an information before the CCI.

First and foremost, the observation of NCLAT in the *Samir Agrawal* case,[21] is unconvincing and far-fetched considering that any person can be a consumer or a potential consumer directly or indirectly for any good or service available in the market and thus, is likely to have his legitimate interest at stake at all times. At this juncture, it is also pertinent to note that the Competition Appellate Tribunal ["**COMPAT**"], was a specially constituted tribunal to deal with competition matters and consisted of members having significant subject matter expertise, whereas the NCLAT falls short of such specialised competition law knowledge. The observation of the NCLAT with respect to '*locus standi'* is based on the reasoning that any other interpretation of Section 19(1)(a) would result in unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives.

As also highlighted earlier, the fundamental objectives of the Competition Act is the fair functioning of the markets and *not* to judge the antecedents of the informant. If the CCI finds merit in the anti-competitive conduct being reported to it, the *bona fide*/locus/motive of an informant should become subservient to the duty of the CCI to ensure fair functioning of the markets. Steered by the legislative intent behind the Competition Act, the CCI, in the case of

[18]*Samir Agrawal* (NCLAT) (n 1).
[19]*Amanullah v State of Bihar* [2016] 6 SCC 699 (SC).
[20]*Samir Agrawal* (NCLAT) (n 1).
[21]ibid.

Reliance Agency v Chemists and Druggists Association of Baroda,[22] had held that "*the proceedings before the Commission are inquisitorial in nature and as such, the locus of the Informant is not as relevant in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter*."

Considering the NCLAT's perspective, the following concerns may arise if a wider interpretation is given to Section 19(1) (a), allowing information to be filed by anyone, with or without any invasion in their legal rights:

1) Possibility of frivolous or vexatious litigations with oblique motives;
2) Increased burden on the resources of the CCI and its investigative arm;
3) CCI is sufficiently equipped with the *suo-moto* power to initiate an inquiry and hence a wider interpretation of Section 19(1) (a) of the Competition Act to include anyone as a 'person' eligible to file an information, may not be required.

The first concern i.e., the NCLAT's apprehension with respect to unscrupulous people raking anti-competitive issues to pursue oblique motives is not dumbfounded. However, we submit with diffidence and welcome any counter to our submission that the Competition Act contains sufficient safeguards to cull such practices. First and foremost, the CCI is required to form a *prima facie* opinion in terms of Section 26(1) of the Competition Act which is merely an administrative order and does not require a thorough investigation by the investigative arm i.e., the Directorate General of the CCI.[23] This also tackles the second concern. If the CCI believes that an 'information' is filed with oblique motives or it discloses no *prima facie* case, it can very well close the case under Section 26(2) of the Competition Act after recording its reasoning. Further, Section 45 of the Competition Act empowers the CCI to impose a penalty which may extend up to rupees one crore on a person (including the who furnishes the information), who, *inter alia*, makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular. The CCI has reinforced this position in *Alkem Laboratories Limited* case,[24] wherein it has held that "*Section 45 of the Competition Act empowers the Commission to punish any person who fails to provide necessary information or documents or knowingly omits to state any material fact*".

[22]Case No. 97 of 2013 (CCI), [83]-[84].
[23]*Competition Commission of India v Steel Authority of India Ltd* [2010] 10 SCC 744 (SC).
[24]*Alkem Laboratories Limited v Competition Commission of India* [2016] Comp LR 757 (COMPAT).

Addressing the third concern, we submit that the Annual Report of the year 2018-19 published by the CCI[25] itself provides that the *suo-moto* power of the CCI to initiate proceedings against anti-competitive conduct is not the sole derivative for initiating action. The third-party complainants assume an even greater significance in an anti-competitive atmosphere. The Report highlights the fact that the percentage of alleged contraventions noticed due to receipt of information under Section 19(1) (a) was comparatively higher than the percentage of *suo-moto* investigations initiated by the CCI, in the past decade. Upon analysing the data provided in the aforesaid Annual Report,[26] it can be concluded that the *suo-moto* investigations initiated by the CCI in the past decade were just thirteen percent of the total contraventions noticed by the CCI due to receipt of information under Section 19(1)(a). Moreover, on August 23, 2019, the Hon'ble Finance Minister of India, while addressing the gathering on the CCI's 10th anniversary, emphasized on the need to increase the number of *suo-moto* proceedings by the CCI. The Hon'ble Finance Minister envisioned a new competition law regime - 'CCI Version 2.0' which will see an increase in the number of *suo-moto* cases by the CCI.[27]

Further, when most of the anti-competitive activities are carried out in a clandestine manner, it becomes essential for the CCI to act upon the slightest information it receives against any possible violation of the Competition Act. Accordingly, we submit that reading a requirement of *'locus standi'* of an informant into Section 19(1) (a), (i.e., the narrow interpretation of Section 19(1) (a) given by the NCLAT), maybe against the legislative intent of the framers of the Competition Act, and may even contribute to its progressive weakening.

V. THE GENERAL LEGISLATIVE INTENT

We support our submission that Competition Law is in fact law *in rem* and not law *in personam* and advocate the wider interpretation of Section 19(1) (a) of the Competition Act by referring to certain amendments, legislative frameworks, and parliamentary debates. Firstly, the Raghavan Committee captures a framework of the administrative structure of the CCI, by noting that "*in the view of the Committee, the CCI should be the sole recipient of all*

[25]Competition Commission of India, *Annual Report 2018-19* (2019) <http://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf> accessed 6 October 2020.

[26]ibid.

[27]Nirmala Sitharaman, 'Speech at CCI 10th Anniversary Celebrations' (Press Information Bureau, 23 August 2019) <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1582738> accessed 7 October 2020.

complaints regarding infringement of the Competition Act from whatsoever sources it may be; an individual, a firm or an entity or the Central or State Governments".[28]

The words, '*from whatsoever sources it may be*', sufficiently indicates that the legislature intended to keep the powers of the CCI with respect to receiving information (then 'complaint'), as wide as possible, in order to ensure free play in the market**.** Further, the word 'complaint' used in Section 19 (1) of the Competition Act earlier, was often misinterpreted and was subsequently substituted by the term 'information' via the 2007 amendment to the Competition Act ["**2007 Amendment**"].[29] This seems to be a conscious attempt by the legislature to widen the ambit of the CCI to initiate enquiry on any possible contravention of the provisions of the Competition Act. In fact, the Delhi High Court, in the case of *Walmart India Private. Limited v Central Vigilance Commission*,[30] had also stated that the term 'information' is broader and more inclusive than the term 'complaint'.

Further, in *Shri Surendra Prasad*,[31] the erstwhile COMPAT gauged the legislative intention behind Section 19(1) (a) and opined that Parliament has neither prescribed any qualification for the informant nor prescribed any pre-condition to be fulfilled before filing an information under Section 19(1) (a). The COMPAT held that the plain language of Sections 18 and 19 read with Section 26(1) of the Competition Act does not infer that the informant must have any personal interest in the matter.[32] A similar view was taken by the CCI in *Shri Saurabh Tripathy v Great Eastern Energy Corporation Limited*,[33] *wherein* it was noted that the Competition Act allows a person to approach the CCI with an information, bringing to the notice any anti-competitive conduct in the market, without necessarily being personally aggrieved by such conduct.

To buttress the argument that the primary object of the CCI is market correction, rather than to resolve conflicts between private parties, it must be noted that the CCI regularly challenges the orders of courts and appellate tribunals before higher forums whenever it deems fit as per the circumstances of the case. Recently, the CCI had also filed a review petition[34] against an

[28]Competition Law Review Committee, *Report of the High-Level Committee on Competition Law and Policy* (Ministry of Corporate Affairs, 2000) para 6.16, ch.VI.

[29]Competition (Amendment) Act 2007, s 13.

[30]2018 SCC Online Del 11005 (DHC) [33].

[31]*Shri Surendra Prasad v. Competition Commission of India* Appeal No. 43 of 2014 (COMPAT) [22].

[32]ibid.

[33]Case No. 63 of 2014 (CCI) [15].

[34]*Competition Commission of India v Nhava Sheva International Container Terminal,* WP No. 25458 of 2019 (BHC).

order[35] of the Bombay High Court allowing the closing of the competition proceedings on account of personal settlement between the parties. The review petition[36] was filed by the CCI against this settlement order[37] *inter alia* on the ground that it exercises its jurisdiction *in rem* with an obligation to curb anti-competitive practices in the market, and hence, a settlement between the parties should not affect its ability to proceed with its investigation.

To further substantiate our argument, para 3.4 of the Competition Law Review Committee Report ["**CLRC Report**"] states "*the Competition Act allows any person having information about any contravention of the Competition Act to provide such information to the CCI..... Given that unlike courts, CCI does not decide a traditional lis which is premised on adversarial proceedings (also observed by the judgment[38] of the Delhi High Court) as proceedings before the CCI are inquisitorial in nature. Against this background, the Committee deliberated on the role of the informant in the proceedings. The Committee agreed that the informant should not be burdened with substantiating allegations.*"[39]

This leads to the conclusion that: (i) the Competition Act is a law *in rem*; (ii) *locus standi* of the Informant is subservient to the objective of the CCI and Competition Act; (iii) the CCI is a market regulator and not an arbiter of private parties; and (iv) its decisions are applicable to the parties beyond the Informant.

Finally, the author(s) would emphasize on certain provisions of the Draft Competition (Amendment) Bill, 2020,[40] ["**Draft Competition Bill**"] read with observations in the CLRC Report.[41] The Draft Competition Bill seeks to empower the CCI to close cases in contravention of Section 3 and Section 4 of the Competition Act, on grounds that same or substantially the same facts and issues have already been decided by the Commission in its previous orders.[42] It can be inferred from this proposed provision that an order passed by the CCI is applicable to the society at large and not to a specific person such as the Informant. Accordingly, the CCI may not look into the cases which concern the same facts and issues. Although the said provision is yet to come into effect, however, it reinforces the limited point that competition law is *in rem* and not *in personam*.

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[35]*Nhava Sheva international Container Terminal Private Limited. v Union of India* WP No. 14277 of 2018 (BHC).
[36]ibid.
[37]ibid.
[38]*Mahindra Electric Mobility Limited v Competition Commission of India* 2019 SCC Online Del 8032.
[39]Ministry of Corporate Affairs, *Competition Law Review Committee Report* (2019).
[40]Draft Competition (Amendment) Bill 2020.
[41]ibid.
[42]ibid, s 26.

VI. APPROACH OF CONTEMPORARY ANTI-TRUST REGULATORS

A. United Kingdom

The Competition & Markets Authority ["**CMA**"] considers complaints as a useful and important source of information relating to potentially anti-competitive behaviour. The Competition Act, 1998 provides that there are a variety of ways in which information can come to the CMA's attention, leading the CMA to investigate into competition contraventions. The CMA relies upon its own market intelligence to make initial enquiries into anti-competitive activities. Alternatively, evidence gathered through other CMA work streams, such as the CMA's merger or markets functions may potentially reveal anti-competitive behaviour. In these circumstances, the CMA gathers publicly available information and may write to businesses or individuals, seeking the relevant further information. Heavy reliance is also placed upon information received from the external sources which helps the CMA to uncover potentially anti-competitive conducts.[43]

B. United States

In the United States ["**US**"], the requirement of 'direct antitrust injury' has become a poignant gatekeeper, being used to weed out those plaintiffs who are not directly harmed by an alleged reduction in competition. The Supreme Court of the US in the *Illinois Brick* case[44] had observed that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" and accordingly the consumer suffering 'direct legal injury' may only have the right to file an antitrust complaint. That is to say the principle of 'direct antitrust injury' requires that the plaintiff prove not only that he suffered an injury, but that the injury is of a particular type that would bring it under the ambit of the antitrust laws.

The bright-line 'direct antitrust injury test' is visibly contested in the US with two-thirds of the states having passed statutes to repeal the principles laid down in the *Illinois Brick* case.[45] While the states have proposed to allow consumers to bring indirect purchaser claims under

[43]'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (*GOV UK*, 4 November 2020) <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases> accessed 14 October 2020.

[44]*Illinois Brick Co. v Illinois* [1977] 97 S.Ct.2061.

[45]ibid.

their respective state laws, the abovementioned test,[46] as upheld in the *Apple v Pepper*,[47] still prevails.[48]

Unlike other jurisdictions, the test of 'direct legal injury' is of significance in the US, especially because their antitrust legal framework provides for criminal conviction. Given that India's competition law regime is more in line with the civil nature of antitrust laws, as followed in the European Union, it is only logical that the Indian competition authorities take a cue from the European antitrust authorities in relation to the *locus standi* of the Informants.

C. European Union

The European Commission has the power to act on a complaint by undertakings, other natural and legal persons and even Member States for an investigation of an alleged breach of Articles 101 (anti-competitive agreements) or 102 (abuse of dominant position) of the Treaty on the Functioning of the European Union ["**TFEU**"].[49]

It is further provided in the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU ["**Notice**"][50] that Information from citizens and undertakings is important in triggering investigations by the European Commission. The European Commission, therefore, encourages citizens and undertakings to inform it about suspected infringements of the competition rules which can be done either by lodging a formal complaint or by simply providing market information to the European Commission.

It is pertinent to note that only natural or legal persons who can show a legitimate interest to lodge a complaint are entitled to file complaints with the European Commission for the purposes of Articles 101 or 102 of TFEU.[51]

The Court of First Instance in the case of *Bureau Européen des Médias et de l'Industrie Musicale*,[52] had held, "*an association of undertakings may claim a legitimate interest in lodging a complaint regarding conduct concerning its members, even if it is not directly*

[46]ibid.

[47]*Apple Inc v. Pepper* [2019] 139 S.Ct.1514.

[48]Colin Kass and David Munkittrick, 'Causation and Remoteness: the US Perspective' (2019) 1 Private Litigation Guide Global Competition Review <www.lexology.com/library/detail.aspx?g=a2155ac4-dcac-43ba-a70b-ba652a619bde> accessed 15 October 2020.

[49]Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/06.

[50]ibid.

[51]Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 7(2).

[52]Case T-114/92 *Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities* [1995] ECR II-147, para 28.

concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members".

Further, the Court of First Instance in the case of *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft v Commission*,[53] had observed that "*a final customer who shows that his economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question and who is a purchaser of goods and services that are the object of the infringement has a legitimate interest in making an application or a complaint in order to seek a declaration from the European Commission that Articles 81 and 82 of the Treaty establishing the European Community (currently 101 and 102 of the TFEU) have been infringed.*"

The above-quoted precedents indicate that consumers (both current as well as potential) have the standing to approach the European competition authorities and their legitimate rights cannot be negated. In the *Samir Agrawal* case,[54] the NCLAT had concluded that the Informant, an independent law-practitioner, does not have the *locus standi* and has not seemingly suffered a legal injury due to the practices of Ola and Uber as a consumer or as a member of any consumer or trade association. Without going into the merits of the case, we submit that irrespective of the profession, an individual residing in India is a potential customer, with his legitimate interests at stake. Therefore, the decision[55] of the NCLAT does not consider the 'potential of legal injury' to the Informant.

Consequently, as many of the anti-competitive practices take place in a clandestine manner, the *suo-moto* power of the European Commission only strengthens, when certain facts have been brought to its attention. The same is true for the *suo-moto* power of the CCI. Third-party or even anonymous information are important sources helping the CCI to uncover anti-competitive activities taking place in a clandestine manner, furthering its objective of market correction.

VII. CONCLUSION

The *Samir Agrawal* case[56] along with stirring the settled position of *locus standi*, highlighted potential issues that can arise from resorting to a conservative approach while interpreting the

[53]Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft* v Commission [2006] ECR II-1601, para 114.
[54]*Samir Agrawal* (NCLAT) (n 1).
[55]ibid.
[56]ibid.

provisions of the Competition Act. The ruling[57] of the Supreme Court on December 15, 2020, reversing the NCLAT decision[58] regarding the issue of *locus standi* has indeed settled the perplexity surrounding the issue of *locus standi* of an informant by observing that "*the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purposes of the Competition Act*".[59]

Nevertheless, in a country where there is a visible boost in the start-up culture, an interpretation such as the one contemplated by the NCLAT in the *Samir Agrawal* case[60] have the potential to indirectly hinder the growth of the start-ups and Small and Medium-sized Enterprises ["**SMEs**"] in the feet of the incumbents. The connection between the two (i.e., start-ups/ SMEs and *locus standi*) is simple as, even before entering the market, start-ups and SMEs have no option but to rely on the existing policies of the incumbents to even start, let alone survive. If such start-ups/ SMEs cannot address the issues before entering the market (given the 'direct legal injury test'), then there will be no incentive left to move into the market in the first place. A broader interpretation of '*locus standi*', as envisaged and laid down by the Supreme Court in its latest ruling[61], will not only help the CCI to bust anti-competitive activities of enterprises, but is also likely to assure the small and new players, that the CCI, as a market regulator, is going to ensure the functioning of the market without prejudices.

Further, the Draft Competition Bill[62] has proposed substantial changes to the Competition Act with respect to antitrust, merger control, and regulatory provisions. Further, given the ever-evolving nature of business economy, unforeseen issues surrounding '*locus standi*' and 'interpretation of provisions of the Competition Act' may come up in the near future. Consequently, this article may be of relevance while dealing with the aforesaid issues and to showcase that Competition law being a law *in rem*, may be interpreted liberally in the interest of the market at large.

[57] *Samir Agrawal* (SC) (n 4).
[58] *Samir Agrawal* (NCLAT) (n 1).
[59] ibid [22].
[60] *Samir Agrawal* (NCLAT) (n *1*).
[61] *Samir Agrawal* (SC) (n 4).
[62] Draft Bill (n 40).