

**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 order² 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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¹Samir Agrawal v Competition Commission of India Competition Appeal (AT) No.11 of 2019 (NCLAT).

²Case No. 37 of 2018 (CCI).

³Samir Agrawal (NCLAT) (n 1).

⁴Samir 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

⁵Shri 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*.

⁷Henry 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*

¹¹Case No. 15 of 2020 (CCI) [50].

¹²Case No. 05 of 2018 (CCI).

¹³Justice 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 its 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).

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

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

