

V. CASE COMMENT: *SAMIR AGARWAL v. CCI*, 2020 SCC ONLINE NCLAT 811

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ABSTRACT

Recently, the National Company Law Appellate Tribunal in the case of Sameer Agarwal v. Competition Commission of India & Ors. decided on the locus standi of the third-party informants to provide information and initiate proceedings before the CCI under Section 19(1)(a) of the Competition Act, 2002. The decision of the NCLAT has been criticised for not being in consonance with the provisions and the legislative intent behind the Competition Act, and violating the principles established by prior decisions. However, the decision of the NCLAT must also be scrutinised in light of the practices followed by the anti-trust watchdogs of other nations. This paper is an attempt in that direction as it seeks to briefly outline the details of the decision, and evaluate the decision of the NCLAT not only from a national perspective, but also from a comparative perspective. In this paper, the authors have extensively analysed and considered the practices followed in the European Union, United Kingdom, and the United States of America regarding the rights of the informants to provide information to their respective competition authorities. The comparative analysis provides the readers with a much more well-rounded approach to critically analyse the decision given by the NCLAT, and the fundamental flaws that are needed to be corrected pursuant to this decision.

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I. INTRODUCTION

Indian competition law makes a commitment to preserve the interests of ‘consumers at large’. On May 29, 2020, the National Company Law Appellate Tribunal (“NCLAT”) delivered a decision in the case of *Samir Agarwal v. Competition Commission of India (“CCI”) & Ors.*, which chips away at this commitment through its fettered stance on the *locus standi* of informants under Section 19(1)(a) of the Competition Act, 2002 (“Act”).¹ The recent decision given by the NCLAT has been severely criticised, as it not only limits the rights of the informants, but also contravenes precedents, and the provisions of the Act.² This article provides a brief background of the initial order passed by the CCI, the grounds of appeal against the CCI’s decision, as well as the recent decision given by the NCLAT. An attempt has been made to critically analyse the NCLAT’s decision with respect to prior precedents and the legislative intent behind the Act. In addition, this article provides a comprehensive comparative analysis pertaining to the rights of the informants in other anti-trust jurisdictions, namely – The European Union (“EU”), the United Kingdom (“UK”), and the United States of America (“USA”).

¹ The Competition Act, 2002, No. 13, Acts of Parliament, 2002 (India).

² Niti Richhariya, *Unsettling the Settled: Who Has The Locus Standi To Approach Competition Commission of India? NCLAT Answers*, KLUWER COMP. L. BLOG (Jul. 17, 2020) http://-competitionlawblog.kluwercompetitionlaw.com/2020/07/17/unsettling-the-settled-who-has-the-locus-standi-to-approach-competition-commission-of-india-nclat-answers/?doing_wp_cron=1594983357.3348379135131835937500&print=print.

A. Background

1. *Order given by the CCI*

In the case of *Samir Agrawal v. ANI Technologies Pvt. Ltd.*,³ the informant alleged that cab aggregators such as Ola and Uber were using algorithms to facilitate price-fixing, and the drivers were accepting those prices set by the aggregators. According to the informant, this led to the formation of a Hub and Spoke cartel,⁴ whereby, the cab aggregators were the Hub and various drivers were the Spokes. Moreover, it was contended that since the cab drivers were not employees of the cab aggregators, but independent third parties, the actions of the cab aggregators resulted in a collusive practice in contravention of Section 3 of the Act. However, the CCI opined that in the present case there was no agreement or an understanding between the drivers and the cab aggregators, or between the drivers themselves to indicate that a Hub and Spoke cartel existed. Further, the CCI clarified that the creation of a Hub and Spoke cartel is contingent on whether there is an exchange of sensitive information between competitors through a third-party platform in order to facilitate price-fixing. Moreover, the existence of a Hub and Spoke cartel is dependent on the conspiracy by the drivers to agree to a fixed price, and the intention to collude ab initio. According to the CCI, the drivers merely acceded to the prices set by the algorithms, and there was no usage of third-party platform by the drivers to exchange sensitive information.

³ *Samir Agrawal v. ANI Technologies Pvt. Ltd.*, Competition Commission of India, Case No. 37 of 2018, <https://www.cci.gov.in/sites/default/files/37of2018.pdf> [hereinafter *CCI Order*].

⁴ Basu Chandola, *NCLAT Rules on Algorithmic Collusion by Cab Aggregators*, IND. CORP. L. BLOG (Jun. 8, 2020), <https://indiacorplaw.in/2020/06/nclat-rules-on-algorithmic-collusion-by-cab-aggregators.html>.

Thereby, there was no prima facie violation of Section 3 of the Act by the cab aggregators.⁵

2. *The grounds of appeal*

The informant, aggrieved by the decision given by the CCI, decided to file an appeal against this decision to the NCLAT,⁶ on various grounds. First, the appellant contended that the decision of the CCI was erroneous and paradoxical, as on one hand, it acknowledged that the cab aggregators fixed prices which the drivers were bound to accept; while on the other hand, the CCI opined that acceptance of these unilaterally determined prices by the cab aggregators is not anti-competitive. Second, the appellant submitted that the CCI was erroneous in treating aggregators and drivers as a single economic enterprise, and observing that there is no agreement between the aggregators and the cab drivers. Third, the appellant opined that the CCI's decision was fallacious because it did not consider the ongoing investigation against Uber for its collusive activities in the USA, in the case of *Meyer v. Kalanick*.⁷

3. *NCLAT's decision*

The NCLAT upheld the observations made by the CCI in its order, and thereby, rejected the appellant's claims regarding any collusion between the drivers and the cab aggregators. However, the NCLAT also observed that at the outset, the informant did not have any right to approach the commission and initiate an action against the cab aggregators on the basis of this information. The NCLAT interpreted⁸ Section 19(1) of the Act, which

⁵ *CCI Order, supra* note 3.

⁶ *Samir Agarwal v. Competition Commission of India*, 2020 SCC OnLine NCLAT 811 [hereinafter *NCLAT judgement*].

⁷ *Meyer v. Kalanick*, Case No. 1:2015cv09796 (S.D.N.Y. 2016).

⁸ *NCLAT judgement, supra* note 6.

enumerates that the CCI has the right to enquire into anti-competitive activities either on its own volition, or on the basis of information provided by ‘any person’, ‘consumer’, or ‘their association or trade association’. In furtherance of this, the NCLAT opined that the usage of the term ‘any person’ approaching the commission for highlighting anti-competitive practices, must be restricted in scope, and should include only the persons who have suffered a direct or an indirect injury through those anti-competitive practices under consideration. The NCLAT believed that even though the concept of Public Interest Litigation has broadened the scope of *locus standi*, the term ‘any person’, under Section 19(1)(a) of the Act cannot be broadly interpreted. The NCLAT’s rationale behind the narrow interpretation of this term was majorly attributable to the objective of restraining/minimising frivolous litigation by ‘unscrupulous people’ having ‘oblique’ motives.⁹

II. CRITICAL ANALYSIS OF THE NCLAT’S JUDGEMENT

The recent judgement passed by the NCLAT has been severely criticised, majorly on the grounds that it was in contravention of the provisions of the Act, the legislative intent behind the Act, and the precedents. For these reasons, this decision was overturned by the Supreme Court. In this section, the authors have critically analysed the NCLAT’s judgement, and elucidated the landmark decision by the Supreme Court.

A. Analysing the provisions and the legislative intent behind the Act

Section 19(1)(a) clearly provides the right to ‘any person’ to bring forth information to the CCI regarding anti-competitive practices. A literal

⁹ *Id.*

interpretation of this provision suggests that there is *prima facie* nothing to suggest that the term ‘any person’ shall only encompass an informant who has been aggrieved by anti-competitive activities, or him being directly affected by the dispute. Moreover, the words “receipt of complaint” were replaced by “receipt of information” under Section 19(1) of the Act through the 2007 amendment,¹⁰ which is indicative of the fact that the Act empowers the public at large to bring forward any information about either actual or potential anti-competitive activities in the economy.¹¹ The NCLAT also failed to consider the importance of the information furnished by a whistle-blower informant, which was also substantiated by the CCI’s annual report of 2018-19.¹²

The NCLAT’s predecessor, the erstwhile, Competition Appellate Tribunal (“COMPAT”), in the case of *Shri Surendra Prasad v. CCI & Ors.*,¹³ held that the legislative intent behind Sections 18, 19(1) and 26(1) clearly suggest that there are no pre-requisites or conditions that need to be fulfilled for ‘any person’ to bring any information before the commission. Further, the preamble read along with Section 18 of the Act, entrust the CCI with the responsibility to eliminate anti-competitive activities. In furtherance of this, the Delhi High Court in the case of *Telefonaktiebolaget Lm Ericsson v. Competition Commission of India*,¹⁴ held that the commission’s proceedings are *in rem* rather than *in personam*, which implies that these proceedings do

¹⁰ The Competition (Amendment) Act, 2007, No. 39, Acts of Parliament, 2007 (India).

¹¹ Richhariya, *supra* note 2.

¹² Competition Commission of India, *Annual Report 2018-19*, COMP. COMM’N OF IND. (2018-19), <https://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf>.

¹³ *Shri Surendra Prasad v. CCI & Ors.*, COMPAT, Appeal No. 43 of 2014 [hereinafter *Surendra Prasad* case].

¹⁴ *Telefonaktiebolaget Lm Ericsson v. Competition Commission of India*, 2016 S.C.C. OnLine Del. 1951.

not merely affect the parties, but everyone in general. This position was upheld in *Re: Indian Motion Picture Producers' Association v. Federation of Western India Cine Employee*,¹⁵ whereby, the CCI was of the opinion that every decision should accrue benefit to the public at large, and not merely the aggrieved individual/party.

Finally, even the Delhi High Court adopted the stance of broader interpretation when in *Google Inc & Ors. v. Competition Commission of India & Ors.*,¹⁶ it held that the powers of investigation of the CCI are wider than the powers of Police of investigation under the Code of Criminal Procedure (“Cr.P.C.”); in that while the Police cannot begin or continue an investigation without the existence of a complaint,¹⁷ the Commission need not commence or continue an investigation merely upon receipt of information, but upon believing that a violation of the Act has occurred; thereby, yet again highlighting the liberal approach to how information can be received by the CCI by going a step beyond the 2007 Amendment to Section 19(1)(a) of the Act.¹⁸ Therefore, a narrow interpretation of the term ‘any person’ is neither in consonance with the Act nor the legislative intent behind the Act. Each of these precedents underlines or at least implies the impact of anti-competitive activities on not just consumers at large, but also the public at large. When liability can be imposed so generally, access to justice must also be unobstructed.

¹⁵ *Re: Indian Motion Picture Producers' Association v. Federation of Western India Cine Employee*, Competition Commission of India, Case No. 45 of 2017, <https://www.cci.gov.in/sites/default/files/Case%20No.%2045%20of%202017.pdf>.

¹⁶ *Google Inc & Ors. v. Competition Commission of India & Ors.*, W.P. (C) No. 7084/2014 (Del.).

¹⁷ *Id.* at 45.

¹⁸ *Id.* at 39.

B. Excessive fear regarding frivolous litigation

The NCLAT opined that a narrow interpretation of the term ‘any person’ was *sine qua non* for constraining frivolous litigation. As already mentioned, the Act provides the authority to the CCI to oversee and enquire into any anti-competitive activities on its own, or with the help of information provided by the informant.¹⁹ However, Section 26(1) of the Act also empowers the CCI from refusing to order a further investigation and not considering the information provided by the informant(s), in cases where the CCI reaches a conclusion that there are no anti-competitive activities.²⁰ Furthermore, Section 45 of the Act acts as a deterrent against frivolous litigation.²¹ The COMPAT in the case of *Alkem Laboratories Ltd. & Ors. v. CCI & Ors.*,²² supported the powers given to the CCI by Section 45 of the Act to impose a fine up to Rs. 1 crore on the informants who provide the commission with false information and misrepresent the facts, and/or the documents. Thus, the NCLAT’s view to narrowly interpret the provisions of Section 19(1)(a) of the Act is misguided, as the Act already spells out mechanisms to ward off frivolous litigation.

¹⁹ Vinod Dhall, *NCLAT judgement: CCI can’t be made hostage to locus standi*, FINANCIAL EXPRESS (Jun. 12, 2020), <https://www.financialexpress.com/opinion/nclat-judgment-cci-cant-be-made-hostage-to-locus-standi/1988913/>.

²⁰ Competition Commission of India v. Steel Authority of India and Another, (2010) 10 SCC 744 (India).

²¹ Parash Biswal, *Samir Agrawal v. CCI: NCLAT’s Misstep in Interpreting Locus Standi of Whistle-blower Informants*, IND. REV. OF CORP. & COMM. L. (Sept. 12, 2020), <https://www.ircl.in/single-post/2020/09/13/samir-agrawal-v-cci-nclat-misstep-in-interpreting-locus-standi-of-whistle-blower-informan>.

²² *Alkem Laboratories Ltd. & Ors. v. CCI & Ors.*, COMPAT, Appeal No. 9 of 2016 and Appeal No. 14 and 15 of 2016.

C. Contravention to the precedents

The NCLAT's order also contravened various precedents. In the case of *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd.*,²³ the CCI considered the issue of *locus standi*, and clarified that the provisions of the Act made it abundantly clear that 'any person' can furnish information to the CCI, irrespective of whether that person has suffered a direct injury/harm from the alleged anti-competitive practices. Similarly, in the case of *Shri Surendra Prasad v. CCI & Ors.*,²⁴ the COMPAT held that the provisions, along with the legislative intent behind the Act do not put an impediment on any person to bring forth information before the commission. The case of *Nagrik Chetna Manch v. SAAR IT Resources Pvt. Ltd. & Ors.*²⁵ is also illuminative in this regard. The CCI in this case acted on the information furnished by a charitable trust, even though it was not directly injured. The CCI acknowledged and appreciated the information provided, and further encouraged people and organisations to provide information to the CCI in order to preserve consumer interests at large. Therefore, the decision given by the NCLAT was in contravention to the established precedents.

D. Chilling Effect on Informants

By the adoption of a restrictive approach to the *locus standi* of informants without considering the (lack of) malevolent incentive or intent, the NCLAT tried to get itself of good Samaritans in an arena as complex and

²³ *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd.*, Competition Commission of India, Case No. 63 of 2014, https://www.cci.gov.in/sites/default/files/632014_0.pdf.

²⁴ *Surendra Prasad* case, *supra* note 13.

²⁵ *Nagrik Chetna Manch v. SAAR IT Resources Pvt. Ltd. & Ors.*, Competition Commission of India, Case No. 12 of 2017, <https://www.cci.gov.in/sites/default/files/12-of-2017.pdf>.

far-reaching as competition law, which made it important for the Supreme Court to overrule the NCLAT's decision to disqualify informants without consideration of incentive or intent *inter alia*. While the instinct to be wary of informants as wolves in sheep's clothing as a principle was not wrong, it was misplaced in this case and was bound to set a harmful precedent in these ways.

E. Supreme Court comes to the rescue

The Supreme Court in its recent judgement²⁶ was critical of the NCLAT's decision, and after analysing the provisions of the Act, decided to overrule it. The Court was of the opinion that the scope of Section 19(1)(a) and Section 35 of the Act is to be construed in a broad sense, which demonstrates that the definition of 'any person' should not be limited. Further, the Court observed that the subsequent changes brought about by the 2007 amendment²⁷ are not without significance as when the words "receipt of complaint" were replaced by "receipt of information", it was intended to not restrict the ability of a person to furnish information to the CCI.

III. COMPARATIVE ANALYSIS

Even though the NCLAT's judgement has now been overturned, it necessitated the re-evaluation of the rights of whistle-blowers or informants to bring forth information regarding anti-competitive activities before the competition authorities. The perspectives and the practices followed by the EU, the UK, and the USA in relation to the *locus standi* of the informants in competition cases is discussed below.

²⁶ Samir Agrawal v. Competition Commission of India & Ors, 2020 SCC OnLine SC 1024.

²⁷ The Competition (Amendment) Act, 2007, *supra* note 10.

A. Practice in the EU

Article 230 (4) of the Treaty Establishing the European Community (“EC Treaty”) provides that any natural or legal person as third-parties have the right to institute proceedings if they are directly and individually concerned by a dispute.²⁸ The interpretation of ‘direct and individual concern’ was first dealt with by the European Court of Justice (“ECJ”) in the *Plaumann v. Commission*²⁹ case whereby, the applicant, Plaumann & Co. was seeking to reverse the decision of the European Commission (“Commission” or “EC”) regarding its refusal to approve Germany’s actions to impose custom duties on mandarins and clementines imported from third-countries.³⁰ The ECJ held that the third parties may only have a *locus standi* in cases where they are individually concerned, and such claim may only arise “where the decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons.³¹” This position held in the Plaumann case came to be referred as the Plaumann test, and was consequently upheld in many other decisions.³²

Thus, the ECJ held that when a party claims that they are individually concerned by a dispute, they are required to demonstrate and justify as to how

²⁸ Liana Aleshkina, *Third Party Rights to Appeal Merger Decisions according to EC and Swedish Rules*, UPPSALA UNIVERSITY Faculty of Law (2007), https://www.konkurrensverket.se/globalassets/-forskning/uppsatser/aleshkina_08-0099.pdf.

²⁹ *Plaumann & Co v. Commission*, Case C-25/62, (Jul. 15, 1963), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0025>.

³⁰ J.H.H. Weiler, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, JEAN MONNET WORKING PAPER 12/03 (2003), <https://jeanmonnetprogram.org/archive/papers/03/031201.pdf>.

³¹ UNECE, *Appendix I Detailed Analysis of The Courts’ Jurisprudence*, (2011), <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>.

³² Weiler, *supra* note 28.

they are distinguished and specifically affected by that decision. Further, the ECJ in the case of *Glencore Grain Ltd v. Commission*,³³ held that a case before the commission would be of a direct concern if it “directly affects the legal situation of the individual.”

Notwithstanding the strict and narrow interpretation of the principle of *locus standi* by the ECJ, the EU member states have allowed³⁴ whistle-blower informants to bring forth information before their respective competition authorities. Competition authorities of some EU member states provide incentives to the whistle-blower informants.³⁵ The Hungarian Competition Council provides financial rewards to informants for encouraging individuals to furnish the council with information regarding anti-competitive activities.³⁶ Moreover, other member states of the EU like Slovakia also provide monetary rewards and incentives to the whistle-blower informants for uncovering information on anti-competitive activities.³⁷

Further, the EC also allows individuals to provide sensitive information about cartelisation and other anti-competitive activities. The commission may choose to pursue an action based on this information,³⁸ and

³³ *Glencore Grain Ltd v. Commission*, (May 5, 1998), Cases C-24/01, C-25/01, ¶ 43.

³⁴ May Lyn Yuen, *Individuals As Whistleblowers*, MONDAQ (Jul. 24, 2019), <https://www.mondaq.com/uk/cartels-monopolies/828744/individuals-as-whistleblowers>.

³⁵ Ingrid Vandenborre & Thorsten C. Goetz, *Cartels & Leniency 2019 (The Proposed Whistleblowers Directive)*, MONDAQ (Oct. 31, 2018), <https://www.mondaq.com/uk/cartels-monopolies/750238/cartels-leniency-2019-the-proposed-whistleblowers-directive>.

³⁶ Yuen, *supra* note 34.

³⁷ Mary Inman et al., *Whistleblower programmes – making cartel detection more effective*, FINANCIER WORLDWIDE MAGAZINE (Aug. 2020), <https://www.financierworldwide.com/whistleblower-programmes-making-cartel-detection-more-effective#.X6t428gzY2w>.

³⁸ Vincent Brophy & Scott McInnes, *Competition Law and Cartel leniency*, JONES DAY (2012), <https://www.jonesday.com/files/Publication/ea8b8609-7015-4f63-b65e->

it guarantees the anonymity of the informant in consonance with the EU Directive on the protection of persons who report breaches of the Union Law.³⁹ In the case of *Evonik Degussa GmbH v. Commission*,⁴⁰ the EC recognised the rights of third-party informants to provide information to the commission and clearly stated that it was very imperative to keep receiving information from the citizens and other third-party undertakings for triggering investigations.⁴¹ Moreover, the EC also emphasised heavily on the right to anonymity for the informants in this case. The EC has also clarified that consumers/consumer groups that are third-parties should be allowed to file their complaints and intervene in the proceedings against anti-competitive conduct.⁴² Therefore, competition authorities of member states of the EU, as well as the commission, encourage the whistle-blower informants to come forward and provide information regarding anti-competitive activities.

B. Practice in the UK

The erstwhile anti-trust watchdog of the UK, Office of Fair Trading (“OFT”) published its Guidelines on Involving third parties in Competition Act investigations⁴³ in 2006. These guidelines clearly stated that the OFT had

b54898096805/-Presentation/PublicationAttachment/d69e64c0-1d8b-4a45-95d5-8d8d04ed1106/Competition%20EU.pdf.

³⁹ OJ L305/17, Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, (2019).

⁴⁰ Case C-162/15P, *Evonik Degussa GmbH v. Commission*, (Mar. 14, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188851&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4270470>.

⁴¹ Dhall, *supra* note 19.

⁴² Case C-229 and 288/82R, *Fordwerke AG and Ford of Europe Inc v. Commission*, [1982] E.C.R. 3091, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0228&from=HR>.

⁴³ Office of Fair Trading, *Involving third parties in Competition Act investigations*, OFT (Apr. 2006),

the power to conduct an investigation on the basis of the information provided by an informant.⁴⁴ Nonetheless, these guidelines followed the principles laid down in the Plaumann case, as these guidelines stated that a person shall only be granted the status of a formal complainant in competition cases if the complainant is materially affected by the anti-competitive agreement or conduct. However, at the same time, these guidelines did not put any impediment on ‘any person’ to come forward and provide information to the competition authority. Further, Section 15(2)(c) of the Competition Act, 1998⁴⁵ clearly mentions that a third-person can make a complaint to the Competition and Market Authority regarding an anti-competitive agreement signed between two parties.

The UK Competition and Market Authority (“CMA”) replaced the OFT in 2014, and took a more liberal stance pertaining to the acceptance of information provided by the third-parties/informants, and the initiation of the proceedings by third-parties.⁴⁶ The information provided by the third-party informants has been greatly valued and relied upon by the CMA in various cases, where the CMA has launched probes and investigated the alleged anti-competitive practices.⁴⁷ Moreover, the CMA started with an initiative to provide incentives to informants and whistle-blowers in the form of financial

http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284401/oft451.pdf [hereinafter *OFT Report*].

⁴⁴ *Id.*

⁴⁵ Competition Act 1998, § 15(2)(c) (United Kingdom), <https://www.legislation.gov.uk/ukpga/1998/41/data.pdf>.

⁴⁶ *OFT Report*, *supra* note 43.

⁴⁷ Giles Washington, *UK anti-cartel laws and their enforcement*, PINSENT MASONS (Mar. 5, 2020), [https://www.pinsentmasons.com/out-law/guides/uk-anti-cartel-laws-and-their-enforcement#:~:text=Cartels%20involve%20companies%20acting%20together,criminal%20offence%20in%20the%20UK.&text=This%20is%20enforced%20by%20sectoral,and%20Markets%20Authority%20\(CMA\)](https://www.pinsentmasons.com/out-law/guides/uk-anti-cartel-laws-and-their-enforcement#:~:text=Cartels%20involve%20companies%20acting%20together,criminal%20offence%20in%20the%20UK.&text=This%20is%20enforced%20by%20sectoral,and%20Markets%20Authority%20(CMA)).

rewards up to GBP 100,000 where the informant furnishes information regarding anti-competitive activities.⁴⁸ The recent initiative launched by the CMA of “Cracking down Cartels”⁴⁹ is also aimed towards encouraging people, in general, to remain vigilant, and report to the CMA regarding any anti-competitive activities.⁵⁰ Thus, by providing monetary incentives to informants, and introducing various different campaigns to garner awareness and encourage people to provide information regarding anti-competitive activities, the CMA has demonstrated a pro-active approach towards accepting and acting upon the information provided by third-parties.

C. Practice in the USA

The Department of Justice (“DOJ”), and the Federal Trade Commission (“FTC”) in the USA have relied on information provided by third-party informants in the past to uncover and investigate on anti-competitive activities such as cartelisation.⁵¹ The DOJ considers that receiving information from the public regarding anti-competitive practices has become

⁴⁸ Competition & Markets Authority, *Rewards For Information About Cartels*, CMA (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888951/Informant_rewards_policy.pdf

⁴⁹ Adam McCabe, *Exposing cartels: rewards and the race to confession*, LEXOLOGY (MAR. 29, 2017), <https://www.lexology.com/library/detail.aspx?g=7baa560f-b4aa-4d4d-8536-b55e5438a3d2>.

⁵⁰ Bernardine Adkins & Rory Jones, *Cracking Down On Cartels - The Competition And Markets Authority's New Marketing Campaign*, MONDAQ (Feb. 22, 2018), <https://www.mondaq.com/uk/cartels-monopolies/675904/cracking-down-on-cartels--the-competition-and-markets-authority39s-new-marketing-campaign>.

⁵¹ Pariz Lythgo-Marshall, *The Australian Competition and Consumer Commission Immunity Policy for Cartel Conduct: A Critical Legal Analysis*, University of Wollongong, BIICL (2016), https://www.biicl.org/files/1211_eui_fiosele_june_2006__kovacic_paper.pdf.

vital in contemporary times, and provides some bounties to the informants for providing accurate information.⁵²

However, the USA follows a slightly strict model as only a person who is directly affected by the anti-competitive activities/conduct shall have *locus standi* to initiate proceedings before the DOJ,⁵³ and the Civil False Claims Act, amended in 1986 helps to curtail any frivolous litigation by the third-party informants.⁵⁴ Notwithstanding this interpretation, it is widely accepted that the information provided by informants helps in the initiation of a *suo moto* enforcement action by the DOJ against anti-competitive activities, without the requirement for the informant to necessarily testify in court or initiate proceedings.⁵⁵

IV. CONCLUSION

The NCLAT's decision has been subjected to severe criticism on various grounds, some of which have been mentioned above. At the outset, the NCLAT's decision was not in consonance with the provisions of the Act, as it provided a completely different interpretation of the language used in Section 19(1)(a) of the Act. The Supreme Court in its judgement clearly opined that the usage of the word 'any person' is abundantly clear that the Act provides a recourse to all people to provide information to the CCI and initiate proceedings. Moreover, the NCLAT's decision ignored the legislative intent

⁵² The Department of Justice, *Report Violations*, DOJ (Aug. 20, 2020), <https://www.justice.gov/atr/report-violations>.

⁵³ AZB & Partners, *Conflicting views on 'Locus Standi' under the Competition Act, 2002*, AZB & PARTNERS (Oct. 19, 2020), <https://www.azbpartners.com/bank/conflicting-views-on-locus-standi-under-the-competition-act-2002/>.

⁵⁴ Lythgo-Marshall, *supra* note 51.

⁵⁵ *Id.*

behind the Act, which is clear from a conjunctive reading of the preamble and Section 18 of the Act, along with the 2007 amendment which replaced the word “complaint” with “information”, as acknowledged by the Apex Court.

Apart from the recent Supreme Court decision, the importance of analysing the legislative intent has been highlighted by various judicial pronouncements of various Courts. In the case of *Nathi Devi v. Radha Devi Gupta*⁵⁶ it was held by the Hon’ble Supreme Court that the adjudicating bodies should interpret the true legislative intent behind the statute. Further, the Delhi High Court in the case of *Kwality Ice Cream Co. & Anr. v. The Sales Tax Officer, New Delhi*,⁵⁷ opined that when the words of a statute are unambiguous, plain, and clear to interpret, then the courts should only resort to a strict literal interpretation of the provisions, rather than providing a new interpretation that is not in accordance with the provisions and the language used in the statute. Further, the NCLAT’s decision also contravened the decisions given by the erstwhile COMPAT, and the CCI regarding the provisions of Section 19(1)(a) of the Act. Thereby, in furtherance of this, the Apex Court was completely justified to overturn the NCLAT’s decision, as it failed to interpret the literal meaning provided by the provisions of the Act, and also failed to consider the legislative intent behind the Act.

The practice followed by other states is also informative in this context. The UK provides rewards to the informants who come forward and furnish information to the CMA regarding anti-competitive activities like the formation of cartels. Moreover, member states of the EU like Hungary and

⁵⁶ *Nathi Devi v. Radha Devi Gupta*, (2000) 9 SCC 249.

⁵⁷ *Kwality Ice Cream Co. & Anr. v. The Sales Tax Officer, New Delhi*, 11 (1975) DLT 180 (Del.).

Slovakia follow the same model of providing monetary incentives for people to come forward. The EU does not put a bar on any person to provide information to the EC regarding anti-competitive activities, however, pursuant to Article 230(4) of the EC Treaty, only such persons are entitled to have *locus standi* in the proceedings that are individually concerned and directly affected by the matter. Similarly, in the USA, there is no bar on providing information to the DOJ and the FTC, but the concept of *locus standi* has been narrowly interpreted.

However, the stance of EU and USA cannot be taken as a justification for the NCLAT's decision, as there is a very major and fundamental difference between the two. In the EU and USA, the treaty/legislative provisions provide for a restrictive interpretation of the concept of *locus standi*, while the Act, and its provisions place no such impediment on 'any person' to initiate proceedings in India. Moreover, despite the strict provisions in the EU and USA, they still adopt a liberalised approach towards third-party informants, as the information provided by them constitutes a very imperative source for launching probes and undertaking investigations against anti-competitive agreements and conduct. Thus, the judgement of the Supreme Court comes as a much-needed relief against the NCLAT's decision which created confusion.