It is wrong to penalise CCI appeals

thehindubusinessline.com/opinion/cci-is-wrong-in-penalising-appeals/article66357831.ece

January 9, 2023

Ease of doing business is improving for sure. One is not so sure if the same holds good for the cost of doing business, as one thinks of the pain and the misery that it must go through in terms of compliances, red tape, harassment through motivated court cases, access to justice, etc.

The Competition Act, 2002 entitles a party aggrieved by an order of the Competition Commission of India (CCI) to appeal against the same. It improves the ease of doing business. The Competition (Amendment) Bill, 2022, which is under consideration of Parliament, proposes to require the aggrieved party to deposit 25 per cent of the amount due under the order before an appeal is admitted. It adds to the cost of doing business.

Why this proposal? The CCI has imposed an aggregate penalty of nearly ₹20,000 crore since its inception, of which, about 1 per cent has been recovered. The balance is reportedly stuck in frivolous appeals. Hence the proposal to discourage such appeals.

Too many appeals do not necessarily mean that the appeals are frivolous. The appellate authority has disposed of a total of 556 appeals during 2009-21. It has allowed 219 appeals, accounting for 40 per cent of appeals disposed of. Further, CCI has issued a total of 1,030 orders over 2009-2021. Parties have appealed against 333 orders, implying that they accepted 68 per cent of orders without any demur. Neither of these percentages suggests that the appeals are frivolous. Typically, an appeal is filed along with court fees. The courts apply mind while admitting an appeal or staying an order. They often require deposits for admission/stay, at times deposit of the entire amount before admitting an appeal. They come down hard on appeals which are devoid of merit, including imposing costs. Thus, the court process itself has an in-built valve to deter admission of frivolous appeals.

Will it address the issue? Unlikely. Admission of an appeal only means that the appellate authority is willing to look into the disputes. It is not an automatic stay of the order of the CCI, which can use permissible means to enforce its order/recover the full amount.

Today, recovery is not possible only where the order has been stayed. With the proposal in place, once the party deposits 25 per cent of the amount for admission of an appeal, it may not be possible to recover the balance 75 per cent until the appeals are disposed of, which may be a worse outcome. Further, there are orders which are not stayed today, yet the penalty has not been recovered. There are also orders which impose several sanctions other than penalties. The proposal is of no use in such cases.

Wide powers

The law confers wide powers on the CCI to recover the penalty in the manner it has specified in the regulations. It has also an option to seek help from the income-tax authority for recovery of the penalty. The Bill is silent if these provisions have proved ineffective, justifying the proposal.

The proposed measure has been tried earlier in a comparable (market related) law. The Securities and Exchange Board of India Appellate Tribunal (Procedure) Rules, 1995 required deposit of the penalty before the appellate authority entertains an appeal. However, after a detailed consideration,

it was repealed and no such provision exists today in the Securities Appellate Tribunal (Procedure) Rules, 2000. To the best of our knowledge, there is no such provision in any other comparable law in India or in any matured competition jurisdictions. The proposal has several unintended consequences. The CCI imposes a penalty that may extend to 10 per cent of turnover of the party.

At times, the penalty amount is in thousands of crores. The innocent parties may have to pull the shutters down if they have to pay 25 per cent of such amounts upfront to prove their innocence, while their business dwindles as the market ostracises them on account of the order. Or they may have to keep aside always a sizeable idle cash reserve to meet such unexpected contingencies that may arise under business laws, which will only push up the costs of doing business. It is likely to incentivise the dishonest to file frivolous appeals to buy time, while it is a grave injustice for the innocent to deposit the penalty to avail its right to first appeal.

The proposal distorts the level playing field. It presumes that the CCI is always right and the delinquent is always wrong. It also creates a perception of bias in favour of the informant, who, if aggrieved by the order, can file an appeal without any deposit, while the delinquent needs to deposit 25 per cent of the penalty.

Further, one delinquent may be aggrieved by an order that imposes penalty, and another by an order that imposes other sanctions. While the purpose of sanction is same in both cases, only the former is disincentivised to file an appeal as compared to the latter. The proposal seems to be premised on a wrong diagnosis of the issue. Why should the state bother if a party resorts to frivolous appeals? It has to suffer the consequences on disposal of the appeal. It is better to dispose of an appeal in a month, or at best in a quarter, and let the delinquent suffer the consequences at the earliest, rather than collect a percentage of the penalty, and let the innocent suffer the ignominy, deposit and loss of business indefinitely.

The simple solution is faster and timely disposal of appeals, which only requires an adequate appellate mechanism commensurate with its responsibility. The trade-off is between: (a) some investment to provide an adequate appellate mechanism, and (b) disposal of appeals after years/decades, suffering of innocent and reprieve for dishonest people during the interregnum, and capital blocked in deposits. In a sense it is cost to government vs. cost to business.

Hopefully, Parliament will make the right choice. A better choice could be to let the business bear explicitly the cost of appellate mechanism. A regulatory impact assessment would have brought up the inadequacies of the proposal.

Sahoo is distinguished professor, National Law University Delhi. Agrawal is Partner, Regstreet Law Advisors. Views are personal.