



## Competition Law Update: CCI Survives Constitutional Challenge

April 15, 2019

On April 10, 2019, the Delhi High Court handed down a [significant judgement](#) on the constitutionality of certain provisions of the Competition Act, 2002 (**Act**). Various car manufacturing companies had approached the Delhi High Court raising a constitutional challenge against certain provisions after the Competition Commission of India (**CCI**) had imposed heavy fines on the companies for abusive conduct in the aftermarket of spare parts.

The core issues identified by the High Court and its finding on each of them is summarized below:

- **Whether the CCI is a tribunal exercising judicial functions or whether it performs administrative, investigative and adjudicatory functions:** Considering the decision of the Supreme Court in [CCI v. SAIL](#) and [Excel Crop](#), the High Court concluded that the CCI does not only perform adjudicatory functions and as such, could not be characterised as a tribunal. The CCI, according to the High Court, performs multifarious roles which are administrative, investigative, advisory, and/or adjudicatory (when it proceeds to issue *final* orders, directions and (or) penalties) in nature.
- **Whether the creation of the CCI is unconstitutional as it violates the separation of powers principle which is recognized as a basic or essential feature of the Constitution of India:** This issue attacked the very existence of the CCI. After reviewing case law, the High Court noted that concerns of violating the principle of separation of powers arise when a tribunal supplants the pre-existing jurisdiction of a court of another tribunal. The Act, according to the High Court, created new rights and obligations, and the CCI did not divest any court of its functions and its role is not limited to adjudicatory functions. As such, the present structure of the CCI was not found to be in violation of the principle of separation of powers. However, the High Court has held that whenever adjudicatory functions are being exercised by the CCI (i.e., passing of final orders, imposing a penalty), the presence of a judicial member is necessary.
- **Illegality of the Chairperson's casting vote:** The High Court held that the Chairperson's casting vote was an anathema to judicial proceedings, completely irrational, and destroys the collaborative process of decision making. Holding that Section 22(3) of the Act which gives the Chairperson two votes was incapable of being read down, the High Court set it aside.
- **Permissibility of CCI's revolving door:** The High Court found that the "revolving door" policy which permits the members of the CCI to participate and desist from participating at meetings at will, does not automatically result in invalidity. The High Court noted that a court would have to consider the prejudice caused to a party as a result of a varying composition/quorum at the CCI. In the case at hand, since all the members who decided the case, heard it, the High Court found no prejudice. However, the High Court directed that the CCI should ensure that *once final hearing starts*, the same composition hears the matter and directed that this rule should be assimilated in the regulations.
- **Expanding the scope of the direction of investigation:** Following the decision given in [Cadila](#), the High Court found that there was no illegality in expanding the scope of an investigation by the DG/CCI. The Court also held that with the decision of the Supreme Court in [Excel Crop](#), "subject matter" expansion was now permissible without any prior permission or specific direction from the CCI.
- **Whether the absence of separate hearing or guidelines for exercise of discretion, render the CCI's power to impose penalties, unconstitutional:** Holding that parties have sufficient opportunity to present arguments on penalty during final hearing, the High Court rejected this contention. The Court found that

so long as the CCI imposed penalties based on sound discretion having due regard to the objectives of the Act, Section 27 (which gives it the power to impose penalties), could not be held to be unconstitutional.

#### Our view:

- The judgement helped the car companies lay down the law but did not have any impact on the huge fines imposed on them. The companies may now have to fight a lost battle before the appellate tribunal (NCLAT) to argue on merits. In 2016, the erstwhile COMPAT decided and dismissed the appeals of two car makers against the same order.
- While the High Court has, rightly so, struck Section 22(3) from the Act, with the strength of the CCI, now fixed at 4, the possibility of a 2:2 decision increase significantly, creating the need for either (a) legislative/executive change to the strength of the CCI to an odd 3 or 5 member composition; or (b) developing a manner to resolve such situations of tie (eg., hearing by the appellate body).
- The direction of the High Court to “fully man the CCI with 9 members” may be met with impossibility in view of the reduction of the strength of the CCI to 4 members.
- The judgement creates some uncertainty as to whether a judicial member is necessary to hear and pass orders under Section 26(2) of the Act. The High Court held that, “*all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary*” and also notes that orders passed under Section 26(1) of the Act are administrative in nature. This suggests that hearing and passing of orders under Section 26(1) do not require a judicial member. However, since the same administrative process can lead to an order under either, Section 26(1) or Section 26(2) of the Act, there is some likely to be some confusion as to requirement of a judicial member being present given that order under Section 26(2) is a final order.
- The judgement may have some impact on the possibility of an institutional overhaul (that the Competition Law Review Committee was considering) to make the CCI more consistent with what was envisaged in Bhram Dutt i.e., a separation of adjudicatory and regulatory powers within the CCI.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at [insights@elp-in.com](mailto:insights@elp-in.com).

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