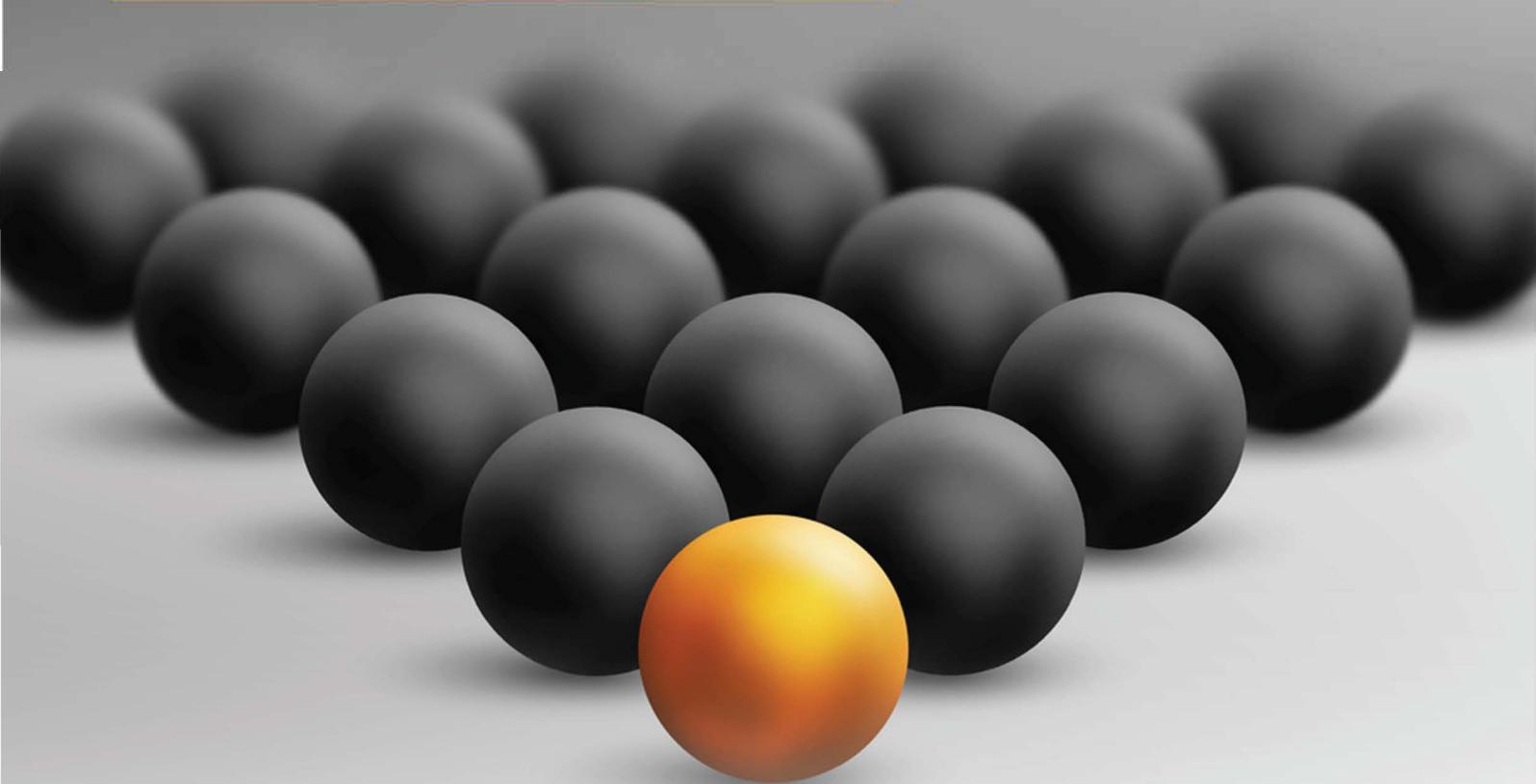




ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

COMPETITION LAW & POLICY UPDATE

QUARTER 2 OF 2019





SNAPSHOT

Existence of evidence remains paramount

NCLAT and CCI continue to place importance on presence and consideration of appropriate evidence while assessing alleged conduct.

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Anti-Competitive Agreements

NCLAT upholds CCI's clean chit to Cement Association, Ramco and Dalmia

While dismissing three appeals arising from closure orders under section 26(2) of the Competition Act, 2002 (Act) issued by the Competition Commission of India (CCI), on April 16, 2019, the National Company Law Appellate Tribunal¹ (NCLAT) rendered its decision wherein it made observations on the onus on the informant to demonstrate appreciable adverse effect on competition (AAEC), the nature of inquiry and investigation by the CCI and Director General (DG), respectively, and maintainability of appeal in case of composite orders².

In this case, the CCI had directed investigation into allegations pertaining to limiting of supply of cement by Ramco Cements Limited (Ramco) on the directions of the Kerala Cement Distribution Association (KCDA). After completing its investigation, the DG submitted his report finding no evidence of limiting supply by KCDA. The matter was sent back to the DG for further investigation by the CCI due to discrepancies in the investigation. The first supplementary report³ recorded no change in the DG's finding but the second supplementary report found evidence of limiting market supplies by Ramco, KCDA and Dalmia Cements (Bharat) Limited under section 3(3) of the Act. On consideration, the CCI held that the facts on record were not sufficient to establish collusion and a one-off instance is not sufficient to establish contravention by KCDA.

In its judgement dismissing the appeals, the NCLAT made the following observations:

- The informant has to provide either direct or circumstantial evidence to the CCI demonstrating that the parties entered into an agreement to engage in collusion. Only then can such an agreement be presumed to have an AAEC.
- On the nature of the DG's investigation, Justice Bhat held that the inquiry directed by the CCI is quasi-judicial and the DG's investigation is only a component of such inquiry. The investigation report is merely recommendatory in nature and the CCI must follow the rules of procedure and conduct the proceedings in a fair and transparent manner.

- On the issue of maintainability of appeal, it was held that despite disagreeing with the DG's findings in the second supplementary report, the CCI closed the matter *largely agreeing* with the DG's recommendations, which is within the ambit of Section 26(6) of the Act (*an appealable provision*). [Note: The CCI's order was uploaded under the 'other orders' tab on its official website and made no reference to a specific section of the Act.]
- The NCLAT also noted that the CCI appeared to have considered the relevant documents to arrive at its finding that no collusion could be established and that there was no material to attribute any role to KCDA pertaining to cement dealerships.
- Further, the NCLAT noted that an isolated instance of manufacturers (*Ramco and Dalmia*) withdrawing post sale discounts would not necessarily be proof of an anti-competitive agreement, more so, since it was backed by justifiable commercial rationale.

The NCLAT's order is available on

<https://nclat.nic.in/Useradmin/upload/9000312815cb85e4aa6b12.pdf>

Conduct of pharma companies justified: CCI rejects complaints

The CCI *vide* two separate orders dated May 10, 2019 and May 23, 2019, rejected two complaints at the *prima facie* stage that alleged Macleods Pharmaceuticals Limited (Macleods) and Cipla Limited (Cipla) were restricting supplies of medicines to the informants on the directions of the Bengal Chemists and Druggists Association.

The pharmaceutical companies contended that there was no restriction of supply and they were only insisting on advance payments for orders placed by the informants due to earlier instances of default in payments. The CCI accepted the explanation provided by the pharmaceutical companies and held that allegations of non-supply of medicines were unsubstantiated and bereft of evidence.

CCI's orders can be accessed on

<https://www.cci.gov.in/sites/default/files/44-of-2018.pdf>

and <https://www.cci.gov.in/sites/default/files/43-of-2018.pdf>

¹ Section 53A defines NCLAT to be the appellate tribunal for the purposes of the Act.

² Composite orders here mean orders which contain both positive and negative findings.

³ When the CCI forwarded the first supplementary report to the concerned parties for their comments, the informant provided additional evidence and requested for further investigation, which was acquiesced to by the CCI. This led to the second supplementary report.

Abuse of Dominance

NCLAT upholds CCI's order rejecting abuse of dominance by Bureau of Indian Standards

On May 2 2019, the NCLAT passed an order upholding CCI's order under section 26(2) of the Act against Bureau of Indian Standards (BIS), holding that the activities carried out by BIS did not make it an enterprise under section 2(h) of the Act.

The appellant was a proprietor of a material testing laboratory and had raised issues with certain accreditation requirements of the BIS, which according to him were *unfair* under section 4 of the Act. The CCI had dismissed the complaint on the preliminary ground that the activities carried out by BIS were not in the nature of *economic activities* and therefore BIS could not be considered to be an enterprise under the provisions of the Act which is a *sine qua non* to bring it within the enforcement ambit of the Act.

In its order, the NCLAT noted that imposing conditions for accreditation of laboratories is an activity carried out by BIS under the mandate vested upon it under the BIS Act 1986 (BIS Act), and concurred with the CCI that BIS was exercising its power to perform such duties for maintaining and recognizing laboratories for the purpose of quality control and standardization. The NCLAT held that since the powers entrusted to the BIS are specifically ascertained under the BIS Act, it would not fall under the definition of enterprise as per section 2(h) of the Act.

The NCLAT order is available on

<https://nclat.nic.in/Useradmin/upload/8530500275ccc3445545fe.pdf>

CCI rejects abuse allegations against Maharashtra Seamless Limited

On May 25, 2019, the CCI rejected a complaint at the *prima facie* stage against Maharashtra Seamless Limited on allegations of denial of access to a variety of pipes (*green pipes*) to the informant (*engaged in oil drilling and exploration industry*).

The case pertained to bidding for tenders floated by Oil and Natural Gas Corporation Limited (ONGC) for procurement of steel and iron products, which is only open to bidders registered with ONGC. India's Steel Policy for government procurement is such that preference will be given to steel that is domestically manufactured by entities which are registered and established in India. In this case, the only way for the informant to qualify as a domestic manufacturer was to procure green pipes from domestic sources (*import of green pipes is prohibited for such tenders*). It was contended that MSL (*being the only domestic manufacturer of green pipes*) did not supply the same to the informant, despite repeated requests. The informant alleged that such refusal to supply amounted to an abuse of its dominant position in the market supported by the Steel Policy.

The CCI noted the conduct of the informant in approaching MSL at a belated stage for supply of green pipes was not diligent, not consistent with the ordinary course of behavior and lacked *bona fides*. MSL submitted that by not responding to the informant's emails, they were honoring the Integrity Pact which prohibits such discreet arrangements between competitors. The CCI also noted that the Steel Policy provides waivers to mandatory domestic procurement, which the informant could have explored. After finding no case of denial of access on these preliminary issues, the CCI found it unnecessary to delineate the relevant market or assess dominant position and closed the case.

The CCI's order is available on

<https://www.cci.gov.in/sites/default/files/48-of-2018.pdf>

Mergers and Acquisitions



CCI approves Reliance's buy-in into the textile sector

The CCI *vide* its order dated April 15, 2019 approved the proposed acquisition of 75% equity share by Reliance Industries Limited (**RIL**) and JM Financial Asset Reconstruction Company's trust (**ARC Trust**) in Alok Industries Limited (**AIL**), which was undergoing insolvency resolution proceedings.

While noting significant overlap between certain operations and products of AIL and RIL, the CCI directed RIL and ARC Trust to file notice in Form-II. The CCI noted that both AIL and RIL were present in the (i) market for production and supply of polyester in India, (ii) market for production and supply of men's fabrics in India, (iii) market for production and supply of men's ready-made-garments in India, and (iv) market for production and supply of bed linen and terry towels in home textiles in India. It was further observed that RIL supplied chemicals for the upstream and downstream market for polyester to AIL.

While determining the relevant market, the CCI observed that each product in the market for production and supply of polyesters in India constituted a separate relevant market and observed that the combined market share of AIL and RIL was less than 30% in terms of the installed capacity and sale of polyester in India. Separately, the combined market share of AIL and RIL for men's fabric, ready-made-garments and home textiles was found to be insignificant. Furthermore, the CCI noted that in both

these segments, other players exerted competitive constraints on AIL and RIL. In the upstream and downstream market of chemicals for polyester, the CCI noted that AIL purchased an insignificant amount of chemicals from RIL as compared to other customers of RIL and therefore the proposed transaction would not foreclose the market.

Based on its assessment of the market shares, the presence of other players in the market, the CCI noted that the parties did not have the ability or incentive to foreclose the market and therefore held that the proposed transaction is not likely to have an AAEC in India.

The CCI's order can be accessed on

https://www.cci.gov.in/sites/default/files/Notice_order_document/Order-648.pdf

CCI recognizes industry practice of white labeling as an effective alternative to structural divestment: Approves Schneider's acquisition of L&T's business

The CCI *vide* its detailed order dated 18 April 2019, approved the proposed acquisition, by way of slump sale of the electrical and automation business of Larsen and Tubro Limited (**L&T**), by Schneider Electric India Private Limited (**Schneider**) and subsequent acquisition of 35% shareholding in Schneider by MacRitchie Investments Pte. Limited.

While delineating the relevant market, the CCI noted that the markets involving low voltage switchgears are clustered in nature, with consumers preferring using components of the same brand while assembling switchboards. Taking cue from the European Commission, the CCI assessed the proposed acquisition at the level of each overlapping product (*of the parties to the proposed acquisition*) and the markets for clustered products in view of possible portfolio effects. During its assessment, the CCI noted that the proposed acquisition may lead to increase in market concentration, limiting product offerings by competitors, locking of existing distribution network and possible reduction in R&D, and found a *prima facie* case of AAEC. Per the regulations, the CCI invited public comments on the proposed acquisition and also conducted a separate market investigation.

Upon consideration of public comments and submissions by parties, the CCI issued a proposal for modification on 16 January 2019, proposing divestment of L&T's business in six high market share low voltage switchgear products to alleviate the likely AAEC. CCI's proposal for divestment was issued in view of *inter alia* concerns such as:

Increase in market concentration Given the high market share of the parties and the large gap between them and the next competitor, there is a possibility that the combined entity would have the ability and incentive to discontinue L&T's offerings or increase the price, thus bringing an end to effective and vigorous competition in the relevant markets.

Small players do not act as competitive constraints Unorganized players in the market do not act as an effective competitive constraint on the LV switchgear industry and that L&T was a significant competitive constraint on Schneider and ABB (*the other established player in the market*).

New entrant constrained from effective entry For an entrant to be considered a competitive constraint to the proposed acquisition, it would have to meet the established standards of timeliness, likeliness and sufficiency. Establishing a brand and optimal distribution network are prime factors constraining effective entry of new players or expansion of existing players, the CCI noted.

Schneider submitted that it would take it a certain number of years to reposition and appropriate L&T's brands, thus buttressing the fact that the gestation period for a new entrant would be significantly higher.

Competitors having limited distribution network While Schneider and L&T would have the largest combined distribution network in India, the CCI noted that their competitors have a limited distribution network and had issues of availability and servicing of existing products.

Modifications

The parties countered CCI's proposal of divestment of two plants of L&T in Ahmednagar and Vadodara by providing their own alternate remedy proposal and stating that as the identified plants were multi-product integrated plants dealing in products other than the identified products, CCI's proposal was unviable and disproportionate.

The alternate remedy package envisaged the strengthening of existing manufacturers by offering them white labelling product manufacturing services for five identified products of L&T for a period of five years and allocating certain percentage of installed capacity at L&T's plants for the same (*Siemens and ABB were not eligible for this arrangement as they had market positions of competitive significance*). At the end of the five-year term of the white labelling remedy, Schneider would provide a mutually acceptable, non-transferable, royalty bearing non-exclusive technology license for a period of five years to a single third party that had availed white labelling services for any of the five identified products.

Additionally, the parties also proposed certain behavioral remedies including price mechanism, export commitments, non-rationalization of their product range and maintenance of their R&D expenditure that are stated to supplement the objectives of modifications.

The CCI accepted the alternate remedies proposed by the parties and observed that they would provide competitors with an opportunity to strengthen their product portfolio and increase the viability of their brands without incurring significant capital investment and enable them to become a competitor as credible as L&T.

The CCI's order is available at

https://www.cci.gov.in/sites/default/files/Notice_order_document/Public1.pdf

Enforcement and Policy Update

NCLAT acknowledges 'severability' in composite orders

In April this year, the NCLAT had the opportunity to assess the maintainability of an appeal preferred against an order passed under section 26(1) of the Act (which in itself is non-appealable) containing CCI's decision with respect to request for interim relief under Section 33 of the Act, which in turn is appealable. On review of the facts, the NCLAT held that where orders are passed under a non-appealable section but contain directions/decisions flowing from an appealable section, an appeal will lie *only* against the order under the appealable section.

The NCLAT's order is available on

<https://nclat.nic.in/Useradmin/upload/20571103075cc162e387449.pdf>

Delhi High Court defines the scope of initiation of non – compliance proceedings by the CCI

In a recent judgement, Justice Gauba of the Delhi High Court provided guidance on the issue of initiation of criminal proceedings in case of non-compliance of orders or directions issued by the CCI.

Here, the CCI approached the Chief Metropolitan Magistrate (*the designated authority to initiate such proceedings*) to initiate proceedings against certain persons under section 42(3) of the Act for not complying with the directions issued by the DG and the CCI. The petitioner contended before the Delhi High Court that (i) section 42(3) cannot be invoked for all types of non-compliances but is limited to the ones identified in section 42(2); (ii) action under section 42(3) would lead to double jeopardy as section 43 already contains mechanisms for dealing with non-compliance with directions of the DG or CCI.

By his order dated 29 March 2019, Justice Gauba clarified that the construction of section 42(3) was disjunctive rather than conjunctive, i.e., the phrase "order or directions issued" in the first limb of section 42(3) is separated by a comma (,) and the word "or" from the second limb, thus the first limb is not qualified by reference to the failure to pay the fine imposed under section 42(2). Accordingly, the Court noted that the cause of the criminal action arises in

two situations: (i) when there has been a failure on the part of a person to comply with the orders or directions issued to him under law; or (ii) on account of failure to pay the fine imposed for non-compliance with orders or directions of the CCI.

On the issue of double prosecution, Justice Gauba held that as the proceedings under section 43 were civil in nature, and therefore, the person cannot be precluded from being charged under section 42(3), which carries criminal implications.

The order of the Delhi High Court is available on

<http://lobis.nic.in/ddir/dhc/RKG/judge-ment/29-03-2019/RKG29032019CRLMM43632018.pdf>

In another ongoing matter pertaining to the similar⁴ issue before another bench of the Delhi High Court, Justice Bhakru, while granting interim relief (which predates the order of Justice Gauba) provided a stricter interpretation of proceedings under section 42(3). He noted that if the scope of section 42(3) is enlarged to include non-compliance of orders other than those listed in section 42(2), it would mean that even an order to do any ministerial act, if not complied with, would result in imposition of severe consequences. The matter is currently under adjudication.

Section 42(2): *If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with a fine which may extend to INR 1 lac for each day during which such non-compliance occurs, subject to a maximum of INR 1 crore, as the Commission may determine.*

Section 42(3): *If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to INR 25 crores, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.*

⁴ http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=297907&yr=2018

CCI conducts workshop on public procurement

As a major buyer of goods and services, actions of the Government of India can potentially impact the relevant markets. Since its inception, the CCI has imposed penalties in around 27 cases pertaining to public procurement and has recognized the lacunae in the mechanism. In March 2018, the CCI had introduced a diagnostic tool and guide for procurement officers to bring their public procurement systems in line with competition law and promote pro-competitive practices.

To sensitize industry further, on procurement related issues, the Standing Conference of Public Enterprises and the CCI jointly organized a workshop on 'Competition Law and Public Procurement' (held on March 27, 2019). The workshop was organized with the objective to highlight the competition issues in the area of public procurement. The workshop was aimed at sensitizing the stakeholders on competition issues in public procurement and to demonstrate a diagnostic toolkit prepared by the CCI for self-assessment of procurement systems by procurement officials and on ways to report any suspicious bid rigging activity to the CCI.

Press reportage on this is available on

https://www.cci.gov.in/sites/default/files/whats_newdocument/CCI-News.pdf

CCI studying the domestic e-commerce sector

According to media reports issued in May, the CCI is believed to have commenced an assessment of the domestic e-commerce industry in order to understand the sector's evolution, business practices, methods and strategies. It was reported that the CCI had engaged Ernst & Young to carry out the study and has already issued detailed questionnaires to relevant parties like All India Online Vendor Association, National Restaurant Association of India, Amazon, Flipkart, among others. The press reports suggest that the questionnaires seeks details regarding, *inter alia*, the percentage of goods sold, reasons behind pricing decisions, volume of sales. It has been reported that e-commerce behemoths like Amazon and Flipkart are unlikely to fully participate in the study in the fear of revealing trade secrets.

On June 18, 2019, the Ministry of Corporate Affairs confirmed the initiation of the aforementioned market study by the CCI *via* a press release. The press release noted that the preliminary findings of the study will be presented at a workshop to be held at end of August 2019 where relevant stakeholders would be invited to provide their inputs. The final study report is likely to be published in the third quarter of FY 2019-20 (Oct-Dec 2019).

Press release available on

<http://www.pib.nic.in/Pressreleaseshare.aspx?PRID=1574850>

ELP Insights

DHC rules presence of Judicial Member is necessary during final hearing – Implications for CCI

In an important ruling, the Delhi High Court (**Court**), on 10 April 2019 delivered its verdict in the case of *Mahindra Electric Mobility Limited and Ors. vs Competition Commission of India & Ors.* ruling on the constitutional validity of certain provisions of the Competition Act, 2002 (**the Act**). Certain automobile manufacturers (**Petitioners**) had approached the Court by way of a writ challenging the constitutional validity of certain provisions of the Act after these petitioners were penalized by the CCI (*vide* order dated 28 August 2014) for their anti-competitive conduct in the aftermarket of automobile spare parts.

In its order, the Court provided its observations on whether composition of the CCI and the procedure adopted by it violates the principles of separation of powers and independence of judiciary, as enshrined in the Constitution of India. The Court also delved into issues such as the constitutionality of imposition of penalties under section 27(b) of the Act, the right of casting vote granted to the Chairperson under section 22(3) of the Act and legality of the revolving door practice⁵.

In a detailed judgement, sections 22(3) and 53E of the Act were held to be unconstitutional and void and the Court *inter alia* directed the CCI to frame guidelines to ensure that the quorum of the CCI does not change during the final hearing. In this article, we focus on the implications of the Court's observations relating to necessity of a judicial member at the CCI and whether there are any immediate implications of the ruling on the functioning of the CCI.

Powers of CCI – adjudicatory or administrative or both? The Court noted that the CCI performs multifarious functions which extend to directing (*and overseeing*) investigation and fact gathering, advising government on policy (*as an expert body*) and issuing directions against entities with the aim of eliminating anti-competitive practices. Relying on decisions of the Supreme Court in *CCI vs SAIL*⁶ and *Excel Crop Care*⁷ vs CCI, it was held that CCI does not only

⁵ Petitioners alleged that Section 22(3) of the Act permits "the revolving door policy" that enables members to participate in one or the other proceedings or desist from participation at their will, essentially destroying the guarantee of fair hearing and violating the basic principle that one who hears must decide.

⁶ 2010 10 SCC 744

⁷ 2017 8 SCC 47

perform purely adjudicatory functions so as to be characterized as a tribunal but is a body that is partly administrative and partly quasi-judicial (*when it issues final orders, penalties*).

It was held that the CCI's task of investigation is not a straightforward adjudicatory task but is preceded by a process which is administrative in nature and that even the investigation and the inquiry phase cannot be termed as an adjudicatory function, as no rights of the party are decided. It is only after the culmination of the investigation that the CCI enters into an adjudicatory phase, where it decides the rights and liabilities of the parties.

If adjudicatory – is judicial presence necessary?

The Court reiterated that as an adjudicatory body, the CCI's orders are quasi-judicial and must be preceded by adherence to fair procedure. However, given the multiple tasks that the Act requires the CCI to discharge, the Court noted that it cannot be held that the CCI must necessarily comprise of lawyers or those possessing judicial experience or those entitled to hold office as judges, to conform with the provisions of the Constitution. The Court observed that CCI was primarily conceived by the Parliament to be a composite market regulator and competition watchdog which is also undoubtedly required to adjudicate at some stage in any given matter. However, the Court concluded that CCI's adjudicatory function *cannot be given such primacy as to hold that the CCI is per se or purely a judicial tribunal*⁸.

Finally, relying on the *ratio* in *State of Gujarat vs Utility Users Welfare Association* which stated that for all adjudicatory functions it is necessary for the deciding bench to have at least one member with a judicial background, the Court held that *at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary*⁹.

Making sense of the ruling

What is an adjudicatory order or final order? Since the Court has found that the presence of a judicial member is imperative in all adjudicatory hearings, it would be important to determine as to which functions/ powers under the Act would qualify as adjudicatory.

For instance, a *prima facie* opinion that a matter does not warrant further investigation under section 26(2) of the Act could be adjudicatory as it decides the *lis* between two or more parties. Orders directing closure of matters at preliminary stage under section 26(2) are appealable before the NCLAT. Similarly, orders of the CCI on claims of confidentiality may be adjudicatory as they determine substantive rights and obligations of parties. The more obvious instances of adjudicatory orders would be orders passed, for instance, under section 27 (imposition of penalties on finding contravention) section 43 (non-compliance with directions of CCI and DG) and section 31 (order approving combinations).

On the other hand, orders where the CCI directs investigation finding a *prima facie* case of contravention could be labelled as purely administrative as have already been recognized by the Supreme Court in *CCI vs SAIL*. However, following the Court's ruling it appears to be unclear whether a judicial member's presence would be mandatory for order passed under section 26(7) and section 26(8) of the Act.

Applicability of the HC ruling

It can be said that the findings and directions of the High Court would apply prospectively. Therefore, any proceedings of the CCI which are adjudicatory in nature (as explained above), after the date of the Court's decision, must be undertaken in presence of a judicial member. Acknowledging the Court's directions, the CCI on 04 July 2019, issued an advertisement¹⁰ inviting applications from individuals with a legal or judicial background for the post of a judicial Member with the CCI. Regardless all adjudicatory proceedings undertaken by the CCI in absence of a judicial member after the date of the Court's order and till the CCI appoints a judicial member will remain open to challenge before appropriate appellate forum/ writ courts.

The Court's order is available here

http://lobis.nic.in/d_dir/dhc/SRB/judgement/11-04-2019/SRB10042019CW114672018.pdf

⁸ Para 144.

⁹ Paras 15 and 213(iii)(c).

¹⁰ https://www.cci.gov.in/sites/default/files/whats_newdocument/Advt.pdf



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