

Indian Competition Law passes the test of constitutionality

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On a comparatively hot afternoon of 10th April 2019, the Delhi High Court ('**HC**') whilst dealing with the writ petitions filed by 10 parties of the Auto Parts order ('**order**')^[1], pronounced a seminal judgement^[2] about the constitutionality of various provisions of the (Indian) Competition Act, 2002 ('**Act**'). By way of background, the Competition Commission of India ('**CCI**') passed the order declaring the activities of 14 original equipment manufacturers ('**OEMs**') of passenger cars in India as a violation of Sections 3(4) (Prohibition against Anti-Competitive Vertical Agreements) and Section 4 (Prohibition of Abuse of Dominance) of the Act, penalising each at 2% of the total turnover in India for three financial years (2007-2010), amounting to approximately ₹254.5 billion (US\$3.65 billion). The petitioners at HC had inter alia contested the validity of the order raising questions pertaining to the constitutionality of various provisions of the Act.

The first challenge the HC ruled on was whether judicial functions performed by the CCI make it an exclusive judicial tribunal. The HC realising the uniqueness of proceedings before the CCI and multifarious roles it performs, declared it to be partly an expert administrative body which only whilst making the Final order (either passing the information for investigation by the Director-General ('**DG**') or dismissing the same), acts as an adjudicatory tribunal. Therefore, it was difficult to rule the CCI as an exclusive judicial tribunal for it does not concern the resolution of *lis* between the parties in a traditional sense.

Ruling on the unconstitutional composition of the CCI, the HC mandated the presence of legal members at all times. After comparing the composition of various Indian tribunals, it held that the bench must comprise of a judicial member whenever the CCI performs adjudication (passing of final orders, imposing a penalty) as these orders have wide ramifications on the markets in India. The Auto Parts order itself was interestingly passed without any judicial member in the bench. As per the scheme of the Act, the bench whilst considering the information either passes a final order dismissing the information or requires the DG to investigate, in which cases it is an administrative order. The decision, however, is ambiguous towards the presence of a judicial member while making an administrative order because it is during consideration of the information by the bench that a final or administrative order is made. Additionally, since the CCI currently has no judicial member there is a scope for all final orders to be challenged as administrative.

More importantly, the decision ruled in favour of the Chief Justice or her nominee to have a casting vote in the selection committee of the Appellate Tribunal. Until now as per Section 53(E), two judicial members and three bureaucrats formed the committee, thus the judicial minority here is declared unconstitutional.

Notably, the "revolving door policy" of participation of CCI members in proceedings was not declared unconstitutional, though the HC in strong words directed the implementation of '*who hears must decide*'. Aiming to bring the hearings at the CCI in line with the courts of the country, the HC ordered consistency in the bench, requiring the matter to be heard afresh should any member recuse or there is a change in the quorum. It also called for the appointment of members requiring the strength of CCI to be nine at all times. Interestingly, the CCI currently has 3 members and given the "minimum government maximum governance" policy of the present government, this might be met with difficulty. The decision also mandates a quorum of seven or a minimum of five members at all stages of decision making, which should be a problem until the vacancies are filled.

Furthermore, the HC struck off Section 22(3) of the Act that allows a casting vote (by the chairperson of CCI) in case of equality in votes, calling it "anathema" to judicial proceedings thereby unconstitutional. It might be noteworthy that the Ministry of Corporate Affairs has limited the membership of the CCI to four, leading more situations of equality in votes, had the provision not been struck off. The proviso to the Section requiring a quorum of three members including the Chairperson for all adjudicatory meetings has been held valid. A dichotomy can be witnessed in the intention of the HC which on the one hand upholds three to be a valid quorum and on the other hand, mandates a quorum of at least five or seven members.

Lastly, the HC upheld the constitutionality of the expansion of the scope of the investigation. Keeping with the view adopted by the Apex Court in the Excel Corp^[3], the HC noted that whilst at the prima facie stage the CCI might not have all the information required to proceed, it is well within the power of the CCI to include parties not mentioned in the information. The verdict at hand further clarifies that such an expansion is possible without any prior permission of the CCI.

There is no doubt that this decision will go a long way in shaping competition law jurisprudence in India and at the same time laying down procedures of enforcement of the Act, albeit the lack of clarity in certain directions issued as well as the status quo of the orders until the vacancies are (if at all) filled by the Central government. There is still a chance of appeal by one of the parties to the Supreme Court. It shall be riveting to see what new rules of the game are set by the courts in this process.

^[1] Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors., Case No. 3 of 2011

^[2] W.P.(C) 11467/2018 & connected matters

^[3] Civil Appeal No. 2480 of 2014