

## **Mahindra Electric Mobility Ltd. v. CCI<sup>1</sup>**

Through this quarterly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India. The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains.

The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

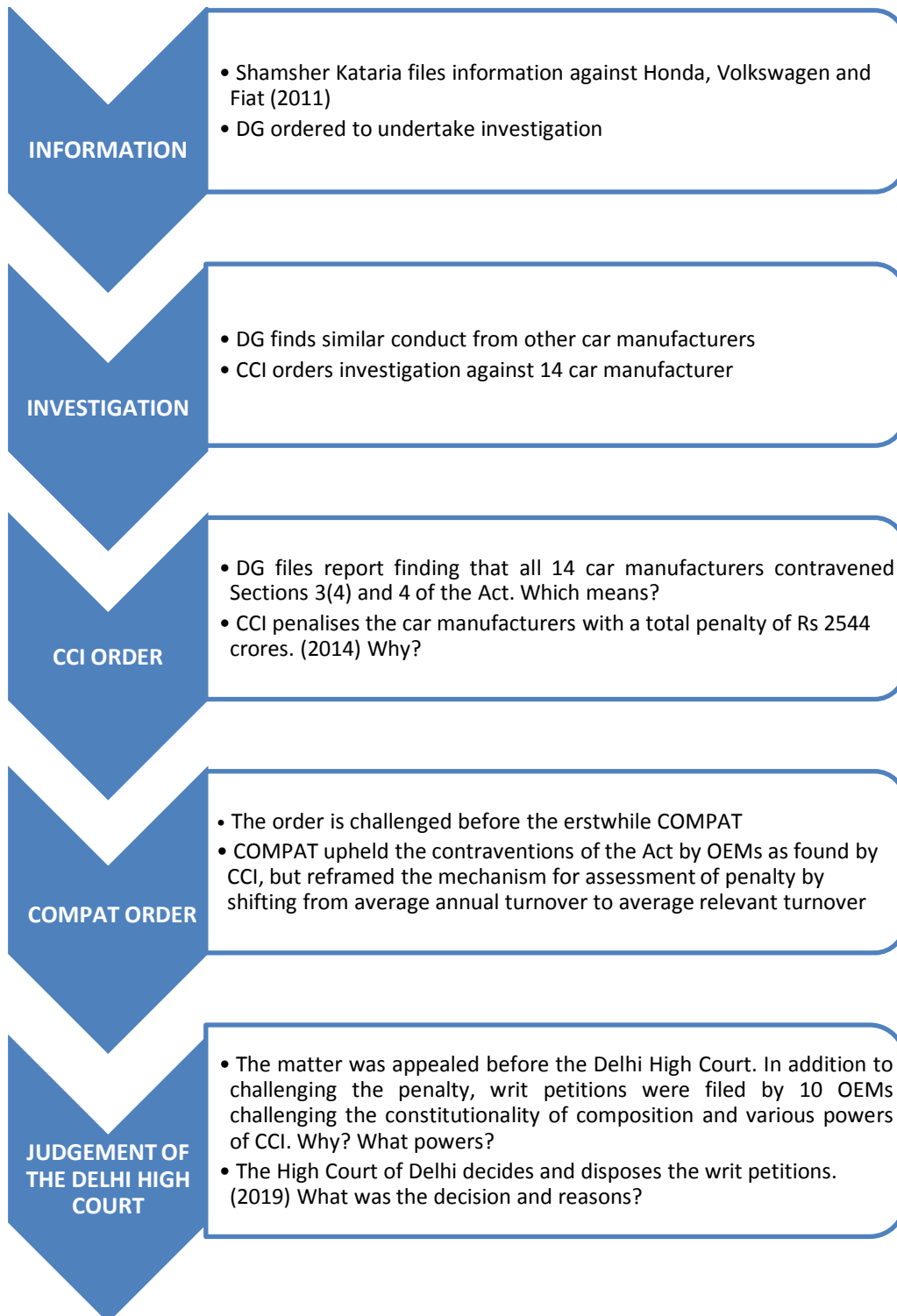
## INTRODUCTION

In a brief life of fewer than two decades, the Indian competition law has faced more constitutional challenges to several of its provisions than most legislations ordinarily do. The High Court of Delhi (hereinafter referred to as the Court) delivered a landmark judgement in a batch of 12 writ petitions (clubbed) that were pending for a long time on April 10, 2019. The petitions were filed by 10 major manufacturers of passenger cars<sup>2</sup> and a music label challenging the powers and composition of the Competition Commission of India (CCI) as well as powers of the erstwhile Competition Appellate Tribunal (COMPAT)<sup>3</sup> (now dissolved and merged with National Company Law Appellate Tribunal NCLAT). Though these writ petitions were not the first occasion when Competition Act, 2002 (hereinafter referred to as the Act) has had to stand the test of constitutional principles,<sup>4</sup> this was the first time that a provision of the Act was held void by a court.

The writ petitions emanated out of a CCI Order dated August 25, 2014 against 14 car manufacturers. Based on the information filed by one Shamsheer Kataria against Honda, Volkswagen and Fiat, the CCI further undertook investigation against 14 other car manufacturers since they were Original Equipment Manufacturers (OEMs) of genuine spare parts of their respective cars. The information was regarding their potential anti-competitive conduct in placing restrictions on their authorised dealers and suppliers of spare parts and diagnostic tools on (i) over the counter (ii) direct sale. The Order penalised the car manufacturers with a total penalty of Rs. 2,544 crore. Aggrieved by this, the opposite parties moved the erstwhile COMPAT and subsequently, the High Court of Delhi in these writ petitions.

The Court addressed some very important issues in the Act that have long been debated. The Act, as it stands, does not mandate the presence of the Judicial Member for meetings. The Act also allowed, until this judgement, the Presiding Member in a meeting a casting vote or the power to vote twice in case of a tie. These legislative gaps were challenged. The Court did well by issuing several directions for both the CCI and the parties, such as the presence of a judicial member in final hearings. Of all the challenges, only the challenge to the casting vote provision was sustained and Section 22(3) held void. For the rest of the issues, the Court only gave limited directions.

## TRAJECTORY



## ISSUES

The Court identified the following major issues<sup>5</sup>:

### **Adjudicatory Functions of CCI – Is CCI a Tribunal?**

The first issue raised by petitioners was that the nature of functions of CCI as well as provisions of the legislation that make CCI an adjudicatory body. Since members of CCI are not appointed by the same judicial process as is done for all other tribunals, the very existence of CCI as a legitimate body was put to question.

In comparison to the Securities and Exchange Board of India (SEBI) where judicial functions are performed by a specially appointed Adjudicating Officer,<sup>6</sup> CCI performs both regulatory as well as judicial functions. In comparison to the Telecom Regulatory Authority of India-Telecom Dispute Settlement and Appellate Tribunal (TRAI-TDSAT) model in which TDSAT exercises wide original jurisdiction while discharging adjudicatory functions and TRAI performs the regulatory functions, the CCI-COMPAT model does not follow the same characteristic because CCI also exercises adjudicatory powers. Additionally, Section 61 of the Act that excludes the jurisdiction of civil courts further indicates that CCI is discharging judicial functions.

### **Constitutionality of Casting Vote and the Revolving Door Policy**

Section 22(3) of the Act provides of the CCI an additional power over other Members to resolve a tie in voting, by means of a casting vote which is equal to two votes. This can allow the Chairperson to sway any decision in his favour, especially since the quorum requirement for a CCI meeting is three Members and the maximum number of Members it can have is 4.<sup>7</sup>

The provision also '*enables members to participate in one or the other proceedings or desist from participation at their will*'.<sup>8</sup> It is referred to as the revolving door practice. This practice allows the Members to participate in a proceeding or a part thereof at their will and desist from participating in the others. Therefore, this creates room for abuse of power.

### **Expanding the Scope of Inquiry u/S. 26(1)**

When information is presented before the CCI u/S. 19 alleging anti-competitive conduct on part of some persons, can it be used by the Commission to expand the scope of inquiry to include other persons not identified in the information? This

question has been raised before the Supreme Court in the past and the Supreme Court has affirmed the power of CCI.

## RELEVANT PROVISIONS

The relevant provisions for the purpose of this analysis are:

### Section 22(3)

- All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, *and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote:*
- Provided that *the quorum for such meeting shall be three Members.*

### Section 26(1) –

- On receipt of a reference knowledge or information, *if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.*

### Section 61

- *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the NCLAT [the erstwhile provision contained COMPAT] is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*

## ANALYSIS

### **Adjudicatory Functions of CCI – Is CCI a Tribunal?**

Ruling: The Court held that the CCI performs multiple functions. Its role is “*in parts administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial -when it proceeds to issue final orders, directions and (or) penalties*”.<sup>9</sup> It does not perform only or purely adjudicatory functions, and hence, cannot be called a tribunal. Relying on *CCI vs. SAIL*,<sup>10</sup> the Court held that the stage where the Commission only considers an inquiry and gives a prima facie opinion on pursuing the inquiry is not adjudicatory but administrative. The adjudicatory functions come only at the end of the whole process of addressing information on which inquiry is pursued and proceedings conducted, and the rest of it is only administrative. Relying on *State of Gujarat v. Utility Users Welfare Association*,<sup>11</sup> the Court also directed CCI to ensure the presence of the Judicial Member at all times during the final hearing.

Analysis: While it is true that a part of the functions that CCI performs does include adjudication, the nature of issues that the CCI adjudicates upon are very different from those that reach other adjudicatory bodies such as Courts or Tribunals. The inquiries undertaken by the CCI are not driven by any dispute between two parties.<sup>12</sup> While deciding on an issue based on the investigation, CCI cannot go beyond the defined jurisdiction of the Act. In exercising that jurisdiction, the Commission is not driven by the grievance of any party. Rather, it is moved by the aim of *eliminating practices having adverse effect on competition, promoting and sustaining competition, protecting the interests of consumers and ensuring freedom of trade carried on by other participants in markets in India*.<sup>13</sup> In that sense, the proceedings before the CCI are undoubtedly unique.<sup>14</sup>

Another significant ground for distinguishing CCI from other tribunals is that their roles do not overlap with the regulatory functions. However, in CCI, their administrative, advisory, regulatory and quasi-judicial roles overlap by sanction from the legislation itself.<sup>15</sup> Therefore, the Court has correctly declined that CCI is a tribunal.

An important issue that received very little attention and only so in the form of a direction was the requirement of presence of a Judicial Member throughout the hearing. When the Court accepts the judicial functions of the Commission, no matter how insignificant, it should be mandatory for the Judicial Member to be present at the time of the hearing. This is an important consideration that has been ignored for long and even in this judgement, the trend continues. Also, the Court has

conveniently while answering this issue that forming a *prima facie* opinion for inquiry under Section 26(2) is part of the administrative powers and not quasi-judicial functions. However, the Court has deviated from it while answering the casting votes issue by removing the scope of casting vote power of the Presiding Member even at the stage of inquiry.

### **Constitutionality of Casting Vote and the Revolving Door Policy**

Ruling: While declaring S. 22(3) unconstitutional and void, the Court upheld the revolving door practice if, after the case is put up for final or substantial hearing, the Members presiding over the proceedings are not changed when the final Order is written. Only the proviso to S. 22 (3) remains valid. The Court stated that casting vote while performing judicial functions is an anathema to the Rule of Law. As opposed to the casting vote provisions in SEBI Act, 1992 in which the provision is only applicable at the time of making an administrative decision and not an adjudicatory one, CCI follows this provision in both administrative and judicial functions.

With respect to the revolving door policy, the Court held that to the extent that a Member who was not present at the time of hearing decides the matter, the policy would be bad in law. It further stated that a mere possibility of abuse of law does not invalidate a law. However, in a case such as this one, in which some of the Members who were present at the time of the hearings but could not be present at the time of writing of the Order because of their retirement from the service, the revolving door practice will not vitiate the final Order. The Court gave some directions to cap the possibility of deviation due to the revolving door policy such as:

- i. Once final hearings in any complaint or batch of complaints begin, the membership should not vary.<sup>16</sup>
- ii. The Central Government is to take steps to ensure full Membership of CCI is maintained.

Analysis: Among various functions of CCI, the most significant one is, arguably, the quasi-judicial function where the Commission decides on legitimacy of the behaviour of the concerned market players. While performing this role, the Commission needs to be fair in its assessment of facts as established by investigation and evidence. For a fair assessment, it is important that the decision of each Member is weighed equally in deciding the issues. The provision of casting vote was a major obstacle to the performance of this function. It is, of course, true that the provision of casting vote exists in a lot of places in administrative functions such as that of the SEBI Chairman. However, the provision of casting votes even in these cases is only

applicable to administrative matters, and all judicial decisions must be decided by the procedure of a majority vote. The casting vote provision in the exercise of a quasi-judicial function makes it unfair.

While dealing with this issue, the Court has gone against something it stated earlier in the judgement. In Paragraph 77 of the Judgement, the Court has expressly stated that “[a]t the stage when CCI entertains and directs an inquiry, it does not perform any adjudicatory function”. However, while rejecting the casting votes clause, the Court in Paragraph 163 has held that Section 22(3) is void in its entirety because the Chairperson can abuse the casting vote power by requiring investigation in the matter where the rest of the Members disagree. This is a clear contradiction in the Judgement with respect to understanding whether the inquiry process has to be considered as part of the judicial function or administrative.<sup>17</sup>

The revolving door policy has been adequately dealt with in the judgement and the Court has given significant directions to ensure that the policy is not abused. The emphasis on “one who hears must decide” was well-placed.

### **Expanding the Scope of Inquiry u/S. 26(1)**

Ruling: Drawing from the judgement of the Supreme Court in *Excel Crop Care India v Competition Commission of India*<sup>18</sup> in which this issue was particularly addressed, the Court held that the DG may expand the scope of his investigation to allied issues. Since the information based on which the inquiry is initiated is often brief, the investigation has to have the room for expansion beyond the scope of the information.

Analysis: The law is well settled on the issue from the Excel Crop Care judgement. Even in absence of that judgement, there is no reasonable basis to such contention that the Commission may not expand its scope of enquiry beyond what it is informed of. This can again be drawn back to the issue of its role as not functioning like a purely quasi-judicial body. Due to this, it is driven by its objective of ensuring a healthy competition in the market and not of resolving disputes between the parties. As part of its duty u/S. 18, the CCI is well within its powers to do this.



## CONCLUSION

Despite ruling against some strikingly unfair provisions of the law, this judgement upholds most of the powers of the Commission. It establishes that the CCI is not like any other regulator in the country. The Commission performs a multitude of functions, and since the adjudicatory functions are not its sole duty, it does exercise a recognisable degree of quasi-judicial functions. As regards the absence of a Judicial Member in proceedings, it has been considered by the Court, but it did not give any substantial mandate in this regard. This issue raises a further concern. Since the Commission only has three Members at present (excluding the Chairperson), of which there is no Judicial Member, the Central Government would need to change its policy from last year when it rightsized the CCI to have only three Members and one Chairperson.<sup>19</sup> Until this happens, the CCI will be constrained from making any Orders. Further, the present composition of CCI is only of three Members including the Chairperson and it does not include any Judicial Member.

The judgement also brings to question the intent with which the Cabinet rightsized CCI to only three Members. The Press Release says that it was done with the objective of "Minimum Government-Maximum Governance". In a bid to achieve minimum government, the government is hampering the maximum governance agenda because this approach is incapacitating an already understaffed CCI from regulating the Indian markets properly.<sup>20</sup>

The casting vote practice has been rightly declared unconstitutional. One significant point that the Court failed to consider was clarifying whether forming a *prima facie* opinion for conducting an inquiry is an administrative function or judicial. Despite a 152-page long judgement, this leaves a serious gap in the law that needs consideration. The Court has given adequate directions for managing the revolving door practice that must be complied with strictly. Expansion of the scope of inquiry is well placed and a reiteration of the *Excel Crop Care*<sup>21</sup> judgement was done because expanding the scope of inquiry is in perfect harmony with the role of the Commission.

## Endnotes

- <sup>1</sup> 2019 SCC OnLine Del 8032.W.P.(C) 11467/2018 & connected matters, High Court of Delhi. Available [here](#). Accessed on July 05, 2019.
- <sup>2</sup> Mahindra, Tata Motors, General Motors, Mercedes Benz, Skoda, Honda, Volkswagen, Hindustan Motors, Fiat and BMW
- <sup>3</sup> Competition Appellate Tribunal
- <sup>4</sup> The Act faced constitutional challenge even before it came into existence in *Brahmduttvs. Union of India* (2005) 2 SCC 431. The Government agreed to make the necessary amendments in the Act which were added to the Act by the Amendment Act of 2007.
- <sup>5</sup> The Court identified a total of six issues of which this analysis covers the four important and relevant ones. Casting Vote and revolving door policy issues were dealt with by the Court together.
- <sup>6</sup> Section 15-I, SEBI Act, 1992
- <sup>7</sup> Including the Chairperson. See Press Information Bureau, Government of India, Cabinet. Cabinet approves rightsizing the Competition Commission of India, April 04, 2018. Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178397>. Accessed on July 16, 2019
- <sup>8</sup> *Supra* n. 1, pp. 117.
- <sup>9</sup> *Supra* n. 1, pp. 64.
- <sup>10</sup> (2010) 10 SCC 744.
- <sup>11</sup> 2018 (6) SCC 21
- <sup>12</sup> CCI has expressly refrained from addressing consumer dispute. When information is filed before the CCI regarding an individual commercial dispute, CCI issues Orders abstaining from deciding on those matters. See *Sanjeev Pandey vs. Mahindra & Mahindra*, Case no. 17 of 2012; *Subhash Yadav vs. Force Limited and Ors.* Case no. 32 of 2012; *Rajendra Agarwal vs. Shoppers Stop Limited*, Case No. 21 of 2018.
- <sup>13</sup> S. 18, the Act.
- <sup>14</sup> *Supra* n.1, pp. 135, Paragraph 189.
- <sup>15</sup> This means that both administrative as well as quasi-judicial decisions are taken by the same Members.
- <sup>16</sup> *Supra* n. 1, Paragraph 213.
- <sup>17</sup> Goswami, S., What is the CCI's Real Role? A Discussion of the Delhi High Court's decision in *Mahindra & Mahindra v Commission*, W.P.(C) 11467/2018. Available [here](#). Accessed on July 16, 2019.
- <sup>18</sup> 2017 (8) SCC 47
- <sup>19</sup> Press Information Bureau, Government of India, Cabinet. Cabinet approves rightsizing the Competition Commission of India, April 04, 2018. Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178397>. Accessed on July 16, 2019.
- <sup>20</sup> This has been stated in the past. See *Kapur, D., and Khosla, M. Regulation in India: Design, Capacity, Performance*. Bloomsbury Publishing 2019, pp. 296.
- <sup>21</sup> *Ibid*

This edition was prepared by Prakash Vaibhav, Research Associate ([prv@cuts.org](mailto:prv@cuts.org)), CUTS International with inputs from Swasti Gupta, Research Associate ([swg@cuts.org](mailto:swg@cuts.org)), CUTS International.

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