

TWO DECADES OF THE COMPETITION ACT

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ABSTRACT

In its brief 11-year existence, the Competition Commission of India [“CCI” or “Commission”] has been the sole quasi-judicial/regulatory body tasked with eliminating practices which have an adverse effect on competition, promoting and sustaining competition, protecting the interests of consumers, and ensuring freedom of trade, in markets in India. The CCI performs a two-fold task which includes, first, the regulation of mergers/amalgamations between firms to ensure that market power doesn’t get concentrated amongst a few players and, second, the elimination of practices by firms which cause or are likely to cause an appreciable adverse effect on competition [“AAEC”].

This article will examine the constitution of the CCI as a statutory body and its jurisdiction to regulate anti-competitive practices by firms in India. Further, this article will encompass the jurisdiction of the appellate tribunal, and the scope of the jurisdiction of the office of the Director General of the CCI [“DG”] to investigate anti-competitive practices. Lastly, the authors discuss the changes that are planning to be introduced by the Competition (Amendment) Bill, 2020, to the existing competition law regime in India.

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I. DAWN OF COMPETITION LAW IN INDIA

In the initial years of India's independence, as early as the start of the first five-year plan in 1951, the broad objective of India's industrialization policy was to protect the developing domestic industries. Enacted in 1969, the Monopolies and Restrictive Trade Practices Act [**"MRTP Act"**] established the MRTP Commission [**"MRTPC"**], a quasi-judicial body which was entrusted with the function of breaking up or controlling monopolies and ensuring that India's economic policy did not result in the concentration of economic power in the hands of the few. Provisions of the MRTP Act were in line with the 'License Raj' approach of government policy of the time, which focused on creating a business environment where virtually all elements of economic activity were subject to government intervention and control. In the 1990s however, the rapid changes in the business environment as well as the adoption of liberalization measures which facilitated a free market economy with emphasis on international competitiveness called for amendments to the law in India. Thus, the need was felt to shift the focus from curbing monopolies to promoting competition. Accordingly, the government decided to appoint a committee to examine this range of issues and propose a modern competition law framework suitable for the evolving economy.

It has been two decades since the Raghavan Committee [**"Committee"**] submitted its report recommending the need to overhaul India's rigidly structured MRTP Act. In its report, submitted in May 2000,¹ the Committee proposed a modern competition law framework, which emphasized distinguishing between competition policy and competition law, to facilitate fair competition between businesses and protect the market from any distortion while also protecting the interests of the consumers. The proposed new law would focus on three activities,² which would form the contours of competition law akin to mature jurisdictions of the world, namely –

- i. Anti-competitive agreements – Amongst competitors or between firms in buying/selling relationships with the likelihood of restricting competition.
- ii. Abuse of Dominance – Dominant firms abusing the position of strength they wield in the market that allows them to operate independently of competitive pressure through practices like restriction of quantities, markets, and technical developments.

¹Report of the High Level Committee on Competition Policy and Law' (Government of India, May 2000).

²Report of the High Level Committee on Competition Policy and Law' (Government of India, May 2000).

- iii. Mergers and acquisitions – Regulation of mergers and acquisitions amongst enterprises if they reduce or harm competition.³

II. EARLY DAYS OF COMPETITION LAW IN INDIA (2000-2007)

Based on the recommendations made by the Committee and with the inputs of the international antitrust community while taking into account India's prevalent legal and regulatory framework and market conditions, the Competition Act, 2002 ["Act"] was enacted by the legislature in January, 2003. The Act established the Commission as the successor to the MRTPC, however, constitutional challenges to the Act and the Rules made thereunder meant that various provisions of the Act remained unnotified and the CCI was constituted with only one permanent member.

The first such challenge was before the Supreme Court of India in the case of *Brahm Dutt v. Union of India*,⁴ where the writ petition prayed for the following – (i) striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 ["**Selection Rules**"]; and (ii) direct the Central Government to appoint a former Chief Justice of a High Court or a former senior judge of a High Court to the post of Chairperson of the CCI in terms of the decision of the Supreme Court in *S. P. Sampath Kumar v. Union of India*.⁵ Rule 3 of the Selection Rules requires the Central Government to constitute a Committee for selecting the Chairperson and other members of the CCI.⁶ In accordance with the provisions of Rule 3 of the Selection Rules, the Committee was constituted by the Central Government and subsequently, a Chairperson and a member were appointed to the CCI. The member took charge of office immediately after being appointed but the appointment of the Chairperson was challenged before the Supreme Court, since the person selected for the position did not belong to a judicial background. The challenge to the appointment of the Chairperson and the Selection Rules was based on the doctrine of separation of powers, since the Act envisaged that the Commission would function as a judicial body with adjudicatory powers, the Chairperson had to necessarily be a

³However, at the time of submitting its report, the Committee considered that very few companies were of "international size" and in light of the liberalisation of the economy, only mergers beyond a certain threshold limit in terms of assets would require a "pre-notification".

⁴*Brahm Dutt v Union of India* (2005) 2 SCC 431.

⁵*S.P. Sampath Kumar v Union of India* (1987) 1 SCC 124.

⁶Rule 3, Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003.

person formerly belonging to the judiciary and appointed by either the Chief Justice of India or his nominee. During the pendency of the proceedings, the Union of India submitted that it proposed to introduce amendments to the Act, which would have a clear bearing on the question of separation of powers raised in the present proceedings. Therefore, the Supreme Court dismissed the petition, with the recommendation that if the Central Government sought to create an expert body, it would be appropriate to consider the creation of two separate bodies – (i) one with the expertise to perform advisory and regulatory functions; and (ii) the other which performs the role of an adjudicatory body. The amendments proposed by the Central Government, seeking to make the CCI operational, were introduced in the form of the Competition (Amendment) Bill, 2006, which proposed significant amendments to the Act. The Competition (Amendment) Bill, 2006, was approved by both houses of the parliament and enacted in the form of the Competition (Amendment) Act, 2007 [**“2007 Amendment”**],⁷–

- i. The statement of objects and purposes specified that the CCI, which was originally proposed to function as a judicial body, would now act as an expert body with the objective of preventing and regulating anti-competitive practices, as well as acting in an advisory capacity to the Central Government in framing the competition policy.
- ii. The statement of objects and purposes also prospectively resolved a future administrative challenge on the absorption of the employees of the MRTPC. The CCI and the COMPAT were responsible for absorbing these employees within a period of two years.
- iii. Inserted Sub-Section (ba) to Section 2 and Section 53A, establishing the Competition Appellate Tribunal [**“COMPAT”**] which was empowered to entertain appeals from certain orders or decisions of the CCI.

III. COMPOSITION AND THE NATURE OF FUNCTIONS PERFORMED BY THE CCI

By way of the 2007 Amendment, the Central Government resolved the challenges raised in the *Brahm Dutt* case and paved the way for the notification of all the sections of the Act and the commencement of operations by the CCI. Consequently, Section 3 and Section 4 of the Act were notified, and the Commission commenced operations in May 2009 with Mr. Dhanendra Kumar, a civil servant and former executive director at the World Bank, as its first Chairperson.

⁷The Competition (Amendment) Act 2007 (Act 39 of 2007).

The first big test for the CCI came in the form of a constitutional challenge to the procedure for inquiry prescribed under the Act. Section 26 of the Act lays down the procedure for inquiry into matters initiated by an information,⁸ filed before the Commission, for allegations of anti-competitive conduct of enterprises.⁹ In the landmark case of *Competition Commission of India v. Steel Authority of India Ltd. & Anr.*,¹⁰ the Supreme Court examined the following – (i) the factors distinguishing the nature of proceedings and the orders passed by the CCI under Section 26(1) and Section 26(2) of the Act; (ii) the power granted to the CCI to pass interim orders under Section 33 of the Act; (iii) the jurisdiction of the appellate tribunal under Section 53A of the Act; and (iv) the right of the Commission to be impleaded as a party in appellate proceedings before COMPAT. With respect to the nature of orders passed by the CCI under Section 26(1) of the Act, the Supreme Court held them to be inquisitorial and regulatory in nature, i.e., it is an administrative power and not an adjudicatory power exercised by the CCI. An order passed by the CCI under Section 26(1) only directs the DG to investigate and collect information/data and it does not involve any determination of guilt or innocence of the opposing party. This was in contrast to an order passed by the CCI under Section 26(2) or Section 27 of the Act, which gives a clear determination with regards to the rights and obligations of the parties and subsequently, closes the proceedings. Therefore, the Supreme Court held that the orders of the Commission under Section 26(1) were not appealable and the CCI was not obliged to grant the opposing parties with a notice or a hearing at a stage where it was merely directing the DG to investigate the allegations. However, the Supreme Court observed that, while the Act did not require the CCI to record any detailed reasoning in an order under Section 26(1) of the Act, it was still required to provide minimum reasons to substantiate its decision to form a *prima facie* opinion with respect to a violation under the Act. While examining the nature of powers granted to the CCI for passing interim orders under Section 33 of the Act, the Supreme Court observed that Section 33 empowered the Commission to issue interim orders only in rare situations wherein

⁸Section 19, The Competition Act 2002 (Act 12 of 2003).

⁹Based on the information received by the CCI under Section 19 of the Act, CCI must form a *prima facie* view whether there exists a case for further investigation or not. If CCI decides that a case exists for further investigation, it must issue a direction under Section 26(1) of the Act, directing the DG to investigate into the matter. However, if the CCI comes to the conclusion that no *prima facie* case is made out, it passes an order under Section 26(2) of the Act for closing the matter.

¹⁰*Competition Commission of India v Steel Authority of India Ltd.* (2010) 10 SCC 744.

it was required to stop a party from carrying on any such act which was clearly in contravention of the Act. The application of such interim orders is limited to the period till the end of the inquiry and must necessarily be supported by the CCI's reasoning.

With respect to the appellate jurisdiction of the COMPAT under Section 53-A of the Act, the Supreme Court held that, Section 53-A only permitted appeals against certain orders expressly listed in the provision and that the COMPAT could not imply that it had jurisdiction to entertain appeals against orders not listed under Section 53-A, as the same had been consciously omitted by the legislature. This was in line with the legal maxim *Expressum Facit Cessare Tacitum*, which states that "what is expressed makes what is implied silent", i.e., the implied meaning need not be adopted when a clear meaning is expressly provided in a statute or a contract.

Finally, after examining the provisions of the Act, along with the rules framed thereunder,¹¹ the principles of a necessary and a proper party established under Order 1 Rule 10 of the Civil Procedure Code ["CPC"], and the common law principle of *audi alteram partem*, the Supreme Court determined that COMPAT should hear all parties before passing any order adverse to their interest. The CCI as a party to proceedings before the COMPAT would help in the expeditious disposal of cases and in any event, the Commission is entitled as an expert body to participate in such proceedings. Accordingly, the Supreme Court held that, the CCI would be considered a necessary party in any appeals filed before the appellate tribunal in cases where proceedings were initiated by the Commission in exercise of its *suo motu* powers, and a proper party in all other cases.

More recently, the Delhi High Court ["DHC"] examined the nature of the functions performed by the CCI and answered questions related to the doctrine of separation of powers in the functioning of the CCI. In *Mahindra Electric Mobility Ltd. & Anr. v. Competition*

¹¹In this case, the Court relied on the following provisions – Section 53-B (procedure for entertaining appeals filed before the appellate tribunal); Section 53-T (right of the Central Government, State Government, the Commission, any statutory authority, or any person or enterprise aggrieved by an order of the appellate tribunal to file an appeal before the Supreme Court); Section 19 read with Section 26 (right of the Commission to initiate proceedings *suo motu* and adopt its own procedure for completing such proceedings); and Regulation 14 and 51 of the Competition Commission of India (General) Regulations, 2009 (right of commission to sue or be sued, including in appeals before the appellate tribunal, and empanelment of special counsels by CCI to assist in proceedings before the appellate tribunal).

Commission of India & Anr.,¹² while determining the nature of the CCI's function, the DHC observed that the initial steps that the CCI takes after receiving an information under Section 19 of the Act are meant to discern whether an investigation and further steps towards adjudication are necessary or not. This initial determination of the need for an investigation is very different from courts/tribunals which are bound to adjudicate upon the dispute presented before it by a litigator. The issuance of notice or summons by the court in exercise of its jurisdiction is a judicial act however the initial stage at which the CCI entertains and directs the DG to conduct an inquiry is merely an administrative function. The DHC took note of the varied specific functions performed by the Commission and relied *inter alia* on the observations made by the Supreme Court in *Steel Authority of India Ltd.* case to conclude that, in addition to its adjudicatory functions, the CCI also performed other functions of a varied nature such as advisory, investigative, administrative, and advocacy. Therefore, the DHC held that the Commission does not exclusively perform adjudicatory functions to be called a tribunal but that did not mean that the orders of the CCI are any less than decisions of a quasi-judicial body.

The DHC also examined whether the composition and the manner of selection of the members of the Commission violated the doctrine of separation of powers by handing judicial powers to an executive body that did not have any members belonging to the judiciary. Based on its deliberation,¹³ the DHC concluded that the test to be considered was whether the body in question takes over the essential function of adjudication without being empowered by the statute to do so effectively. However, since the Commission did not solely perform adjudicatory functions, it was not required to be subjected to this test. Though the DHC did note that, the orders passed by the CCI under Section 26(2) and Section 27 of the Act, were quasi-judicial in nature and therefore required adherence to fair procedure and accepted legal principals. Accordingly, it held that whenever adjudicatory orders are made by the CCI (especially final orders), the presence and participation of a judicial member is necessary. Since, no judicial member was appointed to the Commission at the time, the DHC

¹²*Mahindra Electric Mobility Ltd. v Competition Commission of India* 2019 SCC OnLine Del 8032. The matter is currently pending before the Hon'ble Supreme Court in appeal.

¹³The DHC relied upon the recommendations made in the Raghavan Committee report; provisions of Section 8 (composition of commission and selection committee for chairperson) and Section 9 of the Act (members of the commission); the previous decision of the Supreme Court in *Brahm Dutt and SAIL*; and other leading judgements of the Supreme Court on the doctrine of separation of powers.

directed the Central Government to take expeditious steps to fill the existing vacancy of the CCI within a period of 6 months.

The DHC's decision in the *Mahindra* case gave rise to uncertainty regarding the validity of adjudicatory orders passed by the Commission, in the intervening period until a suitable judicial member was appointed. This issue was resolved by the DHC in *CADD Systems and Services Ltd v. Competition Commission of India*,¹⁴ wherein it was held that, it could not be accepted that through its previous decision in *Mahindra*, the DHC had interdicted the proceedings of the CCI pending the appointment of a judicial member. Further, in accordance with Section 15 of the Act,¹⁵ orders passed by the CCI in the pendency of the appointment could also not be called into question solely on account of the vacancy.

A consolidated reading of the judgments in *Steel Authority of India Ltd., Mahindra and CADD Systems*, establishes the following – (i) the CCI is a quasi-judicial body performing a myriad range of functions including those of advisory, investigative, administrative and advocacy; (ii) the orders passed by the Commission under Section 26(1) of the Act are administrative orders involving no determination of rights of a party and therefore, no appeal lies against the same, and finally; (iii) the CCI must mandatorily have a judicial member present at the time of passing an adjudicatory order under Sections 26(2), 26(6), 26(7) and 27 of the Act, however, vacancy for the post of judicial member would not interdict functioning of the Commission while a suitable candidate is selected and appointed.

IV. PROCEEDINGS BEFORE THE CCI

A. Casting vote by the Chairperson

The DHC also considered other issues in the *Mahindra* case concerning the decision-making process adopted by the members of the CCI. One such issue was the power granted to the Chairperson or the presiding member at the meeting to have a second or a casting vote in case of an equality of votes under Section 22(3) of the Act. The DHC held Section 22(3) to be void as it compromised the collegiality by allowing the Chairperson to cast a second vote to swing the decision in their favour. While Section 22(3) of the Act was struck down as void,

¹⁴*CADD Systems and Services Ltd. v Competition Commission of India* 2019 SCC OnLine Del 9252.

¹⁵Section 15, The Competition Act 2002 (Act 12 of 2003).

the validity of the proviso to Section 22(3), which requires that a minimum quorum of 3 members be present for taking any decisions was upheld.

B. Revolving door

Another issue examined by the DHC was the issue of revolving door at the meetings of the CCI. In the *Mahindra* case as well as other notable cases such as the *Cement Manufacturers Association v. The Secretary, CCI & Ors.*,¹⁶ commonly known as the Cement Cartel case, it was alleged by the parties that there was no consistency in the composition of the bench hearing a case and it varied from one hearing to another. Further, certain orders passed by the CCI were signed by members who were not part of the final hearing, and such revolving door mechanism gave rise to the possibility of an abuse of the Act. The DHC relied upon past decisions of the Supreme Court,¹⁷ to hold that a mere possibility of abuse of a statute does not *per se* invalidate the statute and the same would depend on a case-to-case basis. However, the DHC also directed the Commission to frame guidelines ensuring that the principle of “one who hears decides” is embodied in letter and spirit in its functioning. Further, it instructed the CCI that in all final hearings, the quorum should preferably set at either seven or at least, five members. Additionally, there should be no variance in the members constituting the quorum for the hearings in a given case.

C. Scope of the DG’s investigation

The last issue considered by the DHC in the *Mahindra* case related to the power of the DG to expand the scope of an investigation. The initial information filed before the CCI was only related to three Original Equipment Manufacturers’ [“OEMs”], but the DG obtained permission from the CCI to expand the scope of its investigation to 14 OEMs and the division bench held that under Section 26(1) of the Act, the Commission and the DG had the power to expand the scope of the investigation to cover not only conduct that is explicitly alleged in the information but other allied and related conducts as well. This issue had been deliberated upon by a set of past proceedings before the DHC, the first of which was *Grasim Industries v. Competition Commission of India*,¹⁸ wherein a single judge of the DHC held that if the investigation by the DG is based upon information which was not considered by the CCI

¹⁶*Cement Manufacturers Association v The Secretary, CCI* 2012 SCC OnLine Comp AT 267.

¹⁷*State of Rajasthan v Union of India* (1977) 3 SCC 592; *Sushil Kumar Sharma v Union of India* (2005) 6 SCC 281.

¹⁸*Grasim Industries v Competition Commission of India* 2017 SCC OnLine Del 10434.

while forming the *prima facie* opinion, the DG's action would be contrary to the scheme of the Act. The issue came up for consideration once more in *Cadila Healthcare Ltd. & Anr. v. Competition Commission of India & Ors.*,¹⁹ wherein it was contended that, the investigation by the DG and the subsequent report submitted to the Commission were invalid since the petitioner was not named in the information filed, or the *prima facie* order for investigation issued by the CCI. Further, no separate *prima facie* order was against the petitioner as well. Therefore, the DG had proceeded with the investigation against the petitioner without being authorized to do so by the CCI and thus, the Commission's order directing further investigation was required to be recalled. The writ petition was initially filed before a single judge of the DHC, challenging the inclusion of the petitioner in the investigation by the DG, despite there not being any information or *prima facie* opinion recorded against it. The petitioner sought to rely upon the *Grasim Industries* case, however, this was rejected by the single judge of the DHC, on the ground that the CCI would be entitled to treat the part of the DG report as 'information' in line with Section 19 of the Act and proceed to order investigation if the Commission was convinced that there existed a *prima facie* case of contravention.

Subsequently, the dismissal of the writ petition was challenged before a division bench of the DHC, which placed reliance on the judgment of the Supreme Court in the case of *Excel Crop Care Ltd. v. Competition Commission of India*.²⁰ In the *Excel Crop* case, the Supreme Court examined *inter alia* the question regarding the jurisdiction of the DG to investigate and evaluate acts that took place after the information was filed and held that, "*if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition.*"

At the preliminary stage when an information has just been filed, the CCI may not have all the information pertaining to the alleged anti-competitive conduct. The investigation carried out by the DG is meant to gather all the pertinent information that would allow the CCI to

¹⁹*Cadila Healthcare Ltd. v Competition Commission of India* 2018 SCC OnLine Del 11229.

²⁰*Excel Crop Care Ltd. v Competition Commission of India* (2017) 8 SCC 47.

come to a clear understanding of the market and the conduct of the various market participants. In any event, one of the most important factors for the division bench was the open-ended terms of the directions issued to the DG by the Commission to investigate in the *Cadila* case, which were — “*in the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in such contravention*”. Therefore, the division bench of the DHC held that, an investigation by the DG in the absence of a *prima facie* order of the CCI against Cadila Healthcare Ltd. was acceptable. Furthermore, the DG’s ability to investigate based on a reference made under Section 26(1) of the Act was wide enough and the DG was empowered to investigate any anti-competitive conduct that might come to its attention based on the information filed before it. The order of the Supreme Court in the *Excel Crop* case and the judgment of DHC’s division bench in the *Cadila* case led to a subsequent overturning of the order of the single judge in the *Grasim* case before a division bench of the DHC.²¹ The division bench observed that an order of the CCI under Section 26(1) of the Act ‘triggers’ an investigation by the DG and the powers of the DG are not necessarily limited to examine only such matters that formed a part of the original complaint. These judicial precedents have led to a proposed change in the law. Last year, in February 2020, the Competition Commission of India (General) Amendment Regulation, 2020, was enacted to modify Regulation 20 of the Competition Commission of India (General) Regulations, 2009 [“**General Regulations**”]. Regulation 20(4) of the General Regulations delineates the scope of the DG’s investigation report and by the latest amendment, it has been modified to remove any limitations upon the DG to examine only such matters that form the subject matter of the original information or the reference made to the CCI by the DG. Therefore, after this recent modification to Regulation 20, the scope of the investigation which the DG can conduct is, seemingly, almost limitless.

D. The right to cross-examine

In the *Cadila case*, the petitioners had filed an application before the CCI for cross-examination of a key witness who had deposed before the DG. The Commission dismissed the application simply because it was not satisfied with the grounds made out in the

²¹*Competition Commission of India v Grasim Industries* 2019 SCC OnLine Del 10017.

application.²² The division bench held that, although the CCI has the discretion to accept or reject the plea for cross-examination under Regulation 41(5) of the General Regulations, the reason given by the Commission for rejecting Cadila Healthcare Ltd.'s request could not possibly imply a judicious exercise of discretion and therefore, the dismissal was erroneous. Recently, in *MAHYCO Monsanto Biotech (India) Pvt. Ltd. v. Competition Commission of India & Ors.*,²³ the DHC entertained a writ petition challenging an order of the CCI. The said order rejected Monsanto's application for cross-examination of 40 witnesses who had deposited before the DG but allowed for Monsanto to cross examine 23 other witnesses. The petition was dismissed, subsequent to the Commission submitting that, it would not rely on the testimony of the 40 witnesses who had not been cross examined by Monsanto and the same would be expunged from the record. Further, the DHC observed that it would always be open for a party to raise a grievance before the CCI regarding the procedure adopted by it in its decision-making process. Therefore, the DHC left it open for Monsanto to raise any issues it might have concerning the cross examination of the remaining 23 witnesses before the Commission.

E. Jurisdiction of the DG to investigate conduct prior to the enactment of provisions of the Act

In *Kingfisher Airlines v. Competition Commission of India*,²⁴ a division bench of the Bombay High Court ["BHC"] laid down the test of "continuing effect of past conduct" which states that the provisions of the Act would apply to anti-competitive activities entered into before the Act came into force but continuing and subsisting even afterwards. In the *Excel Crop* case as well, the Supreme Court examined the issue of retrospective jurisdiction of the DG to investigate conduct prior to the CCI commencing operations and before Section 3 and Section 4 were notified. The matter had initially been filed before the MRTPC and was transferred to the Commission upon its commencement. Concerns were raised before the Supreme Court in relation to an anti-competitive agreement entered in relation to a tender of

²²The CCI had dismissed Cadila's application for cross-examination on two grounds – (i) the application was filed at an extremely late stage and therefore, CCI had no occasion to grant such request; and (ii) the individuals sought to be cross-examined by Cadila were those whose affidavits were not relied upon by the DG during investigation.

²³*Monsanto Biotech (India) Pvt. Ltd. v Competition Commission of India* 2018 SCC OnLine Del 12991.

²⁴*Kingfisher Airlines v Competition Commission of India* 2010 SCC OnLine Bom 2186.

March 2009, before Section 3 was notified. Relying on the test laid down in the *Kingfisher* case, the Supreme Court held that although the tender in question was from March 2009, the anti-competitive agreement in relation to the tender continued for future negotiations and bids in June 2009, 2010 and 2011 and therefore, the effects of the past conduct had continued even after Section 3 was notified and the DG had rightly considered the same in its investigation report.

F. The power to review/recall

The question of whether the CCI has the power to review or recall its orders passed under Section 26(1) of the Act was first considered by the DHC in *Google Inc. & Ors. v. Competition Commission of India & Anr.*²⁵ It was contended that the investigation had been ordered without affording an opportunity of a hearing and the application for recall of the impugned order was wrongly dismissed by the Commission on the grounds that it did not have the power to do so. The DHC examined Section 36 (power of commission to regulate its own procedure) and Section 37 (which granted the CCI the power to review its own orders prior to being omitted from the Act by the 2007 Amendment) and held that the CCI had the power to recall its order even if the same was no longer expressly provided for in the Act. However, the Commission could take a preliminary view on a complaint and order a probe without hearing the party against whom the complaint has been filed and therefore, no grounds were made for recall of the order simply because the CCI did not grant a hearing before formulating its *prima facie* view. In appeal, the division bench of the DHC, held that the Commission had the power to review or recall its orders irrespective of whether the jurisdiction being exercised to do so was judicial, quasi-judicial or administrative. The CCI orders directing investigation in exercise of its power under Section 26(1) of the Act are capable of being reviewed or recalled even in the absence of any specific provision under the Act. Such an order for review or recall of an order under Section 26(1) is passed in exercise of its administrative power, as Section 36 of the Act empowers the Commission to regulate its own procedure during the discharge of its functions and the CCI does not become *functus officio* after ordering investigation. Further, the deletion of Section 37 of the Act, by the 2007 Amendment could not be taken as a conclusive indication of the legislative intent to divest the CCI of its power to review or recall any of its orders since they would already fall within the ambit of the inherent powers of the Commission. Therefore, the division bench directed

²⁵*Google Inc. v Competition Commission of India* 2015 SCC OnLine Del 8992.

the CCI to consider the recall application afresh within a definite time schedule of two months.

The CCI's power to review or recall its orders also came up for consideration in the *Cadila* case. It was contended that the CCI was bound to review its order directing investigation by the DG in light of the decision in *Google*. However, the division bench distinguished the case of *Cadila* from the decision in *Google* on the ground that, the application for recall in *Google* had been filed before the DG submitted its investigation report to the Commission, whereas in *Cadila* the application was filed afterwards.

Hence, after the decisions in *Google* and *Cadila*, it is clear that the CCI has to regulate its own procedure under Section 36 of the Act, which includes the power to review or recall its orders under Section 26(1). The exercise of this power is administrative in nature and is therefore subject to the same threshold of reasoning as other administrative orders of the Commission.

G. Locus for filing information

The most recent jurisdictional shift to the CCI came in the form of the Finance Act of 2017. The Act was amended by the Finance Act, 2017, which merged the COMPAT with the National Companies Appellate Tribunal ["NCLAT"] in a move aimed at streamlining the functioning of tribunals. In the brief period since it assumed responsibilities for handling appeals arising from CCI orders, the NCLAT has had to deal with the interesting and very important question concerning *locus standi* for filing information before the Commission. In *Samir Agarwal v. Competition Commission of India & Ors.*,²⁶ the NCLAT held that any person who files an information before the CCI regarding any anti-competitive conduct ought to be a person who has suffered an invasion of their legal rights as a consumer or as a beneficiary of healthy competitive practices. Since the informant was an independent law-practitioner, who had alleged that cab aggregator platforms viz. Ola and Uber were using their respective pricing algorithms in their respective apps to fix prices charged by their drivers at rates lower than what the drivers would charge on their own, the NCLAT held that the informant did not have any *locus standi* to initiate action under the Act.

This restrictive delineation of *locus standi* for filing an information before the CCI was overturned by the Supreme Court.²⁷ Based on a reading of the provisions of the Act and the

²⁶*Samir Agarwal v Competition Commission of India* 2020 SCC OnLine NCLAT 811.

²⁷*Samir Agarwal v Competition Commission of India* 2020 SCC OnLine SC 1024.

General Regulations, the Apex Court observed that, any person may approach the Commission with information pertaining to anti-competitive conduct as the definition of “person” in Section 2(1) of the Act is extremely wide and inclusive. Further, the provisions of Sections 19(1) and 35 of the Act were amended by the 2007 Amendment, substituting the words “receipt of a complaint” with “receipt of any information” in the former, while substituting the expression “complainant or defendant” with “person or enterprise” in the latter. This amendment clearly reflected the legislative intention of emphasizing the inquisitorial nature of the proceedings before the CCI, which are proceedings *in rem* and not an *inter se* dispute between the informant and the opposite party. Further, the Supreme Court noted that, Regulation 10 of the General Regulations does not impose any obligation upon an informant to disclose how they have been personally aggrieved by contraventions of the Act. With this judgment from December 2020, the Supreme Court has clarified that the CCI conducts inquisitorial proceedings in public interest. Therefore, it should be open for any person to approach the Commission with information pertaining to anti-competitive conduct.

V. **THE ROAD AHEAD FOR COMPETITION LAW IN INDIA – COMPETITION AMENDMENT BILL, 2020**

Although, since its enactment, the Act and the CCI have functioned more efficiently than even the most optimistic supporters could have envisaged, evolving market trends have once again brought forth the need to amend and update the Act. Therefore, the Central Government constituted the Competition Law Review Committee [“CLRC”] and gave it the mandate to – (i) study market trends and international practices; (ii) examine whether the Act was sufficient to deal with them; and (iii) suggest any changes that might be required to the Act. Based on the recommendations made in the CLRC report, the Ministry of Corporate Affairs [“MCA”] published the much-awaited Draft Competition (Amendment) Bill, 2020 [“2020 Amendment Bill”] on 12th February, 2020. The 2020 Amendment Bill proposes some major changes to the jurisdiction and the functioning of the Commission –

A. **Introduction of a Governing Board**

It has been proposed that a “Governing Board” be established for the CCI, which will be responsible for supervising and regulating the functioning of the Commission. The Governing

Board would be composed of part-time members,²⁸ and *ex-officio* members powered to pass regulations and exercise supervision over the functioning of the CCI. It is anticipated that this will reduce the burden on the CCI as general superintendence, direction and management of the affairs of the Commission shall rest with the Governing Board. Further, the creation of a Governing Body, with the introduction of part-time and *ex-officio* members will increase judicial discipline, as well as accountability and reduce the number of procedural challenges raised during investigations under Section 3 and Section 4 of the Act.

B. Appointment of the DG

Earlier, the office of the DG was not answerable to the CCI, but rather to the Central Government. The 2020 Amendment Bill proposes to merge the office of the DG with the Commission as an investigative branch and thus, shifting the power to appoint the DG from the Central Government, into the hands of the CCI. While this may improve the coordination between the Commission and the office of the DG, this may also have a bearing on the independence of the investigation process.

C. Deposit of penalty for appeal

The 2020 Amendment Bill proposes to incorporate a stipulation that already exists with respect to appeals against penalties imposed and taxes levied under various municipal laws, such as property tax. This amendment would require any party seeking to file an appeal before the NCLAT against any order of the CCI to deposit 25% amount of the penalty levied upon them or such other lower amount ‘as may be prescribed’ at the time of filing the appeal.

D. Settlements and commitments

The 2020 Amendment Bill seeks to introduce the concepts of – (i) settlements; and (ii) commitments to the Act in line with mature competition regimes.

- i. Under the settlements mechanism, a party will be allowed to make an application for closure of proceedings before the CCI, at the stage after the investigation report has been submitted by the DG but before the Commission has delivered its final verdict.
- ii. Under the commitments mechanism, a party under investigation by the DG will be allowed to give a voluntary undertaking by making certain commitments pertaining to the alleged anti-competitive conduct that is under investigation. The party will be

²⁸See Section 2(kb), Draft Competition (Amendment) Bill 2020. In this context, a “Part-Time Member” means a part-time member appointed under clause (b) or clause (c) of sub-section (1A) of Section 8.

allowed to make an application for commitments after initiation of investigation by the DG but before the investigation report is submitted to the Commission.

The proposed amendment also provides that the mechanism for settlements and commitments may be revoked under certain circumstances. Further, in such scenarios, the CCI would have the power to initiate an inquiry based on the evidence submitted under either mechanism. Introduction of these voluntary measures would allow parties to reduce the burden on the CCI to carry out full-fledged investigations in cases where the wrong can be corrected by adopting less onerous measures. This would reduce the time and cost implications for the parties as well.

E. Punitive powers of the DG

Perhaps the most interesting change proposed by the 2020 Amendment Bill is to grant punitive powers to the DG. Currently, neither the DG nor the CCI possess any punitive powers and therefore, the institution did not have any powers to enforce compliance with any orders. The 2020 Amendment Bill intends to introduce a wide range of powers for both the DG as well as the Commission. For instance, any person who fails to produce any documents, information, or record; or does not appear before the DG; or fails to answer any question by the DG; or does not sign the note of cross-examination, such a person will be punishable with imprisonment for a term extending up to six months or fine up to one crore rupees.

Foreseeing the future challenges to India's competition regime, the 2020 Amendment Bill also makes provisions for introducing regulations to deal with anti-competitive actions resulting from the evolving market conditions including digital markets. This can be seen most pertinently in the amended text for Section 19(3), (6) and (7), where the existing provisions are sought to be widened. The 2020 Amendment Bill seeks to introduce sub-clauses (g), (k) and (i) to sub-sections 19 (3), (6) and (7), which would allow the CCI include any additional factor that may be necessary for the purposes of assessing AAEC and the relevant market by way of regulations. The open-ended proposal would prevent the need to repeatedly amend the Act as the nature of markets evolves. For instance, data as a factor for assessing digital markets could now be included specifically by regulation. The 2020 Amendment Bill evolved through a consultative process involving the CCI, legal practitioners, economists, industry experts and will hopefully also include suggestions made by other stakeholders and the public at large. A lot of the changes suggest the maturity of the Commission and that it is ready to take on a role at par with other evolved antitrust

regulators. Additionally, it is evident that some of the changes have been necessitated by the change in market dynamics.

One of the most challenging tasks for the Commission in the near future will be the regulation of the e-commerce sector and the digital economy. Perhaps the biggest challenge arising from the digital markets would be how the CCI deals with the tech-giants – Apple, Google, Amazon, and Facebook. Recently, the CEOs of the four companies were even questioned in a high-profile anti-trust hearing by the US congress amidst allegations of the companies having engaged in several anti-competitive activities.²⁹ The issue of tackling the tech-giants is a challenge currently being dealt with by all the competition regulators across the world. The United Kingdom's Competition & Markets Authority has proposed the creation of a separate pro-competition regulatory regime to regulate the functioning of the tech-giants, given that existing laws and understanding of business activities were not suitable for effective regulation in the e-commerce sector.

Although some of the amendments proposed in the 2020 Amendment Bill indicate an inclination to regulate digital markets both, in terms of conduct as well as consolidation, since the CCI and most other competition regulators are still developing an understanding of digital markets, no concrete regulatory regime has been put in place. Therefore, it remains to be seen whether such open-ended amendments such as those to Section 19 of the Act will prove to be sufficient. Another concern with the 2020 Amendment Bill is the seemingly excessive delegation of powers to the DG, while also shifting the office of the DG away from the control of the Central Government and merging it with the Commission. The proposal to confer the DG with punitive powers that would allow it to impose a penalty of six-month imprisonment or a fine of one crore rupees for non-cooperation during investigations is likely to result in another constitutional challenge on the violation of the doctrine of separation of powers unless subsequent amendments to the General Regulations place reasonable restrictions on the exercise of the powers granted to the DG. Under the current scheme of the Act, the Commission has the power to impose penalty for non-compliance with directions of the DG under Section 43. However, including a penalty provision under Section 41 leads to the inference that penalty powers (including the power to imprison) now also resides with the

²⁹Brian Fung, 'Congress grilled the CEOs of Amazon, Apple, Facebook and Google. Here are the big takeaways' CNN Business (30 July 2020) <<https://edition.cnn.com/2020/07/29/tech/tech-antitrust-hearing-ceos/index.html>> accessed 17 November 2020.

DG. Given that the DG is only an investigative authority and it is the Commission which is the adjudicating authority under the Act, such an amendment would result in excessive delegation to the DG and strikes at the clear separation of powers of the two under the scheme of the Act.

VI. CONCLUSION

Since it commenced operations in 2009, the Commission has had an extraordinary journey filled with legal precedents and statutory amendments. This journey has seen CCI develop into a mature regulator of markets, focused on ensuring a free and fair economy that secures the benefits to consumers over all others. It has been established without doubt that the CCI deals with matters *in rem*, i.e. in the benefit of the Indian public, and therefore the scope of its powers and jurisdiction must be as wide as possible. It is only when the Commission gets to exercise this wide jurisdiction that it can serve the function it has been tasked to perform under the Act and protect the consumer by regulating anti-competitive conduct that may harm the market. However, businesses develop, and the market evolves, and it is up to the regulator to keep pace with the changes. Recent times have seen the digital economy expand exponentially to a point where it has become necessary for the CCI to rise up to the many challenges posed by the different digital market segments. The 2020 Amendment Bill seeks to imbibe learnings from the past decade and at the same time prepare for the future. The Commission undoubtedly is growing into a formidable regulator and the 2020 Amendment Bill seeks to equip it for the next decade of competition law in India.