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## Challenges in CCI's Review of Interconnected Transactions in India

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## Challenges in CCI's Review of Interconnected Transactions in India

### Background

The Indian merger control regime requires transactions that may be 'inter-connected' to one another to be mandatorily notified to the Competition Commission of India ('CCI') by way of a single notice.<sup>1</sup> Accordingly, where one or more transactions in a series of transactions are exempt from CCI's notification requirements, but are nevertheless inter-connected to a notifiable transaction, parties need to: (i) file a composite notice with CCI with details of all transactions, including 'exempt' but inter-connected transactions; and (ii) ensure that no transaction is implemented, including the exempt transaction, prior to receipt of approval from CCI ('**Inter-Connection Provision**'). For example, in *CCI v. Thomas Cook (India Limited)*<sup>2</sup>, the Supreme Court of India confirmed the penalty on Thomas Cook for completing minority market purchases which were independently exempt from notification to CCI. The penalty was imposed by CCI on the ground that they were 'inter-connected' to a share acquisition contemplated by way of a separate share purchase agreement, which in any event had been separately notified to CCI.

The Inter-Connection Provision is not unique to merger control practice in India. Several competition law jurisdictions, including the European Union and the U.K. require composite antitrust review of 'inter-related transactions' which may be staggered in time. The purpose for a composite review is to ensure that notifiable transactions are not avoided by breaking down what is essentially one transaction into multiple sub-transactions, which, when individually examined, avoid notification.<sup>3</sup>

CCI's decisional practice identifies the following parameters for determining whether two or more transactions are 'inter-connected': (i) commonality of business and parties involved; (ii) simultaneity in negotiation, execution and consummation of transaction documents; (iii) commercial feasibility of isolating the two transactions, i.e., whether one would happen without the other; (iv) cross-conditionalities in transaction documents or public announcement of the parties ('**Inter-Connection Parameters**')<sup>4</sup>.

### Challenges with Strict Interpretation of the Inter-Connection Provision

The underlying rationale for notifying inter-connected transactions together is indeed legitimate transactions with a common 'ultimate intended effect' ought to be reviewed by CCI holistically. An unduly wide interpretation however, may lead to outcomes which are impractical and often times, inconsistent, with the underlying rationale behind the provision. These are discussed below.

#### A. Acquisitions by multiple investors in a common target

Contemporaneous investments by unrelated multiple investors in a common target may arguably be 'inter-connected', at least on the basis of the Inter-Connection Parameters identified above; investments are typically negotiated contemporaneously with the objective of investing in a common target. That said, they nevertheless involve a distinct set of acquirers, with independent commercial reasons for investing in a target that may be artificially linked with cross-conditionalities (such as on the extent of funding) or overlapping timelines.

Treating such investments as 'inter-connected' would extend CCI's review jurisdiction as well as corresponding standstill obligations to investments that would have otherwise been exempt from notification requirements. For example, consider an investment by Investor 'A' into a Target enterprise 'X', notifiable to CCI. On account of high combined market shares in markets where A's portfolio entities overlaps with X, the investment by A may justifiably be subject to a relatively time-intensive antitrust review process. At the same time, Investor 'B', which is unrelated to A, with no presence in India, also invests in X. B's investment independently benefits from an exemption. If the Inter-Connection Parameters are mechanically applied to the investment by Investor B, then both investments qualify as 'inter-connected'. The result: an exempt transaction by Investor B is artificially tied to the investment by A. Investment by B is neces-

<sup>1</sup> Regulation 9(34) of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 reads 'Where ultimate effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination'.

<sup>2</sup> *CCI v. Thomas Cook (India Limited)*, Civil Appeal No.13578 of 2015 ('**Thomas Cook**').

<sup>3</sup> European Commission's ('EC') Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings ('**EC Notice**') and Supreme Court's judgment in *Thomas Cook*.

<sup>4</sup> CCI's Order in *Thomas Cook* and **Order under Section 43A against Piramal Enterprises Limited**, Combination Registration No. C-2015/02/249; **Mandala Rose Co-Investment Limited / Jain Irrigation Systems Limited**, Combination Registration No. C-2015/12/356.

sarily subject to CCI review and cannot be implemented until CCI concludes its detailed review, including of an investment by A in X.

Not only would this approach be inconsistent with the underlying rationale behind the Inter-Connection Provision and global best practices, but would entail significant uncertainty in doing business. It was also result in higher transaction costs and regulatory burden as CCI would need to review transactions which are unlikely to impact competitive conditions. Such transactions also may not have a common ‘ultimate intended effect’ – as the competitive effects of each such acquisition would depend on the independent presence of each investor in India

The EC seeks to address concerns that arise from such an interpretation of ‘inter-connected transactions’ by clarifying that two or more transactions are treated as a single concentration, even where they are inter-conditional upon each other, ‘if control is acquired ultimately by the same undertaking(s)’, and that ‘it would **not** be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.’<sup>5</sup>

## B. Uncertain transactions

Extending the Inter-Connection Provision (which covers all inter-connected ‘series of steps’ or ‘small individual transactions’) to transactions that are not yet determinative may lead to impracticable outcomes as identified below.

At the very threshold, in line with global best practices, the Inter-Connection Parameters should be evaluated only where two seemingly related transactions seek to achieve a ‘common ultimate intended effect’. Examining the Inter-Connection Parameters absent this threshold test may result in undesirable consequences, particularly in cases where one transaction may be cross-conditional with an envisaged *albeit* uncertain transaction.

For example, at the time of entering into a binding agreement to invest in Target X, the same investor often contemplates a follow-on investment in the same target that is still being negotiated. In this case, requiring the investor to wait to notify CCI of its primary investment till the follow on investment is fully negotiated and recorded in a binding agreement, may unduly delay transaction timelines and create uncertainty. The issue may be further confounded where a primary investment may not be notifiable but a related follow on transaction, which is still uncertain, is likely to be notifiable to CCI. If the Inter-Connection Regulation were to be applied strictly to this case, case, parties may be unable to consummate the exempt primary investment, in case the follow-on related transaction eventually materializes. Not only would this create uncertainty in doing business, but would be inconsistent with the mandate of the Competition Act, 2002 (‘Act’) that requires parties to notify CCI of transactions that are sufficiently binding<sup>6</sup> and meet the notifiability. In fact, where transactions have been notified to CCI on the basis of uncertain transaction documents, CCI has directed parties to approach them with a filing once there is more certainty.<sup>7</sup>

## Conclusion

Applying the Inter-Connection Regulation mechanically or without necessary flexibility is likely to have wide-reaching implications in form of legal uncertainties, regulatory burden on account of reviewing transactions which may otherwise be exempt from antitrust review, higher transaction costs, avoidable consequences for non-implementation in form of gun-jumping proceedings etc. The difficulties that arise with applying this rule may be avoided altogether if its application is flexible and applied in a manner that is aligned with larger policy considerations and international best practices.



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<sup>5</sup> Paragraph 44, EC Notice.

<sup>6</sup> The Act prescribes a standard threshold for measuring certainty – i.e., execution of any agreement or any binding document which conveys an agreement or decision to acquire control, shares, voting rights or assets.

<sup>7</sup> See, for example, **SVF Doorbell (Cayman) Limited/ Delhivery Private Limited**, Combination Registration No. C-2019/01/633.



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## CCI Orders

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### CCI Dismissed Allegations of Bid Rigging against All India Sugar Trade Association and others

On March 22, 2019, CCI dismissed allegations against the All India Sugar Trade Association ('AISTA') and its Chairman, Mr. Praful Jagjivandas Vithalani, along with other unknown persons, ('AISTA Respondents'), for contravening Section 3(3) read with Section 3(1) of the Act, in an information filed by Mr. Ravi Pal ('Informant').<sup>8</sup>

The allegation pertained to the Chairman of AISTA actively running various discussion forums and WhatsApp chat groups with leading sugar traders/ millers/ refiners and other unknown persons. It was alleged that price sensitive information like sugar prices and forthcoming policy changes by the Government of India, in relation to the sugar industry, was circulated via these groups. The sugar prices were then collated and uploaded on the website of AISTA. The Informant also alleged that information of sugar prices, shared on the Chairman of AISTA's WhatsApp group, reflected the last successful bid prices to sugar tenders in Maharashtra, issued prior to the date of sharing of prices on the WhatsApp group. The Informant further alleged that this enabled all the members of this WhatsApp group to engage in bid rigging by collectively fixing the lowest price for their bids in the sugar procurement tenders from the millers. This process, according to the Informant, indirectly restricted the market for those traders who submitted price bids on the basis of market forces as opposed to the lowest price speculated and collusively fixed by the AISTA Respondents. To demonstrate this, the Informant submitted the average ex-factory price of sugar from the Agricultural Produce Market Committee, purportedly published by Maharashtra Rajya Sahakari Karkhana Sangh Limited, Mumbai. It was the Informant's case that these prices were lower than the 'price sensitive information' circulated on the WhatsApp group.

CCI considered the evidence provided by the Informant and did not find any link between the sugar prices circulated on the WhatsApp group and the average ex-factory net prices of sugar. Considering that the sugar prices circulated on the WhatsApp group were already publicly available, CCI held that circulation of this information, *per se*, does not make it price sensitive information. CCI further held that the Informant had failed to show how the information exchanged on the WhatsApp group affected free play of the market forces with respect to prices of sugar and also failed to show any meeting of minds amongst the AISTA Respondents to achieve this. Other aspects considered by CCI were: (i) members of the WhatsApp group included two millers who would have no interest in colluding on sugar prices; (ii) sugar, as a commodity, is subject to the provisions under the Essential Commodities Act, 1955 and orders issued under it; therefore, the final market price of sugar is dependent upon numerous factors; and (iii) the information filed had general averments, lacking in material particulars to show bid-rigging, *i.e.*, related to the tenders floated by the millers during the relevant period and the bid details *etc.* On the basis of the factors discussed above, the information was dismissed by CCI, stating that the presumptive inference and analysis provided by the Informant could not be the basis for passing of a *prima facie* order to investigate the matter.

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## Combination Decisions

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### CCI approves acquisition of shares by CA Swift Investments and Deli CMF Pte. Limited in Delhivery Private Limited

On February 21, 2019 and March 22, 2019, CCI approved the acquisition of Carlyle Series F Preference Shares by CA Swift Investments<sup>9</sup> ('CA') and preference shares by Deli CMF Pte. Limited<sup>10</sup> ('Deli'), respectively, in Delhivery Private Limited ('Delhivery') ('Parties'). These acquisitions were made pursuant to a Share Subscription Agreement ('SSA') dated December 20, 2018. CA and Deli, the existing shareholders of Delhivery, held 12.75% and 4.76% (on a fully diluted basis) equity shareholding, respectively, in Delhivery and pursuant to the completion under the SSA, CA's and Deli's shareholding in Delhivery would be 11.88 % ('Proposed Combination-1') and 4.51% (on a fully diluted basis) ('Proposed Combination-2') respectively. The reduction in CA and Deli's equity shareholding in Delhivery post the Proposed Combination 1 and Proposed Combination 2 is due to the subscription of 22.44% of the total share capital of Delhivery by

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<sup>8</sup> Case No. 25 of 2018

<sup>9</sup> Combination Registration No. C-2019/01/634

<sup>10</sup> Combination Registration No. C-2019/02/640



SVF Doorbell (Cayman) Limited ('SVFD'), which is also part of the common agreement i.e., the SSA. SVFD's subscription to 22.44% of the total share capital of Delhivery was earlier notified to CCI and was approved vide order dated 21 February 2019<sup>11</sup>. CA, Deli, SVFD, Delhivery and certain others also entered into a Shareholders' Agreement ('SHA') on December 20, 2018.

The Proposed Combination -1 was notified in relation to subscription by CA of Carlyle Series F Preference Shares in Delhivery. CA is an investment holding company incorporated in Mauritius. It is a special purpose vehicle owned and controlled by investment funds and advised by affiliates of the Carlyle Group (a global alternative asset manager).

Deli is a wholly owned subsidiary of China Momentum Fund, L.P. ('CMF'), a private equity fund, and has been incorporated solely for the purpose of making investments in Delhivery. Fosun China Momentum Fund G.P. Limited ('FCM'), a wholly owned subsidiary of Fosun International Limited ('FIL'), is the general partner of CMF. Deli alone did not qualify the financial threshold under Section 5 of the Act. However, taking into account the financials of FIL, which controls the management and operation of CMF, the notice was filed by Deli with CCI with respect to the Proposed Combination 2.

Delhivery, which is incorporated in India, is engaged in provision of third party logistics services in India, including the provision of services such as transportation, warehousing, etc.

Based on the information provided, CCI approved the Proposed Combination-1 without delineating a relevant market since: (i) there was no horizontal or vertical overlap between the activities of the Parties; and (ii) on account of the acquisitions by SVF Doorbell (Cayman) Limited and Deli, despite the additional investment by CA, its shareholding in Delhivery, in percentage terms, would reduce after the Proposed Combination.

While assessing Proposed Combination-2, CCI noted a limited vertical overlap between the activities of the Parties, since one of the companies beneficially owned by FIL appeared to have investments in an entity which is engaged in the leasing of trucks in Karnataka, Tamil Nadu and Mumbai.

However, CCI also approved the Proposed Combination-2, considering: (i) Deli and Delhivery are not engaged in similar services; (ii) facts and factors provided for competitive assessment under Section 20(4) of the Act; and (iii) Deli's shareholding in Delhivery, in percentage terms, would reduce after the Proposed Combination-2, because of the acquisitions by SVF Doorbell (Cayman) Limited and CA.

### **CCI Approves Acquisition by CK Holdings Co. Limited of the Component Business of Fiat Chrysler Automobile N.V.**

On March 8, 2019, CCI approved the proposed acquisition of the automobile component business of Fiat Chrysler Automobile N.V. ('Fiat'), housed in Magneti Marelli Italy ('MM Italy'), Automotive Lighting Reutlingen GmbH ('AL Germany'), Magneti Marelli Holding USA LLC ('MM US') and their respective subsidiaries ('Fiat Entities'), by CK Holdings Company Limited ('CK Holdings'), ('Proposed Combination').<sup>12</sup> The Proposed Combination had been structured as an acquisition of the entire share capital of MM Italy, AL Germany and MM US by CK Holdings and notified to CCI further to the execution of a Share Purchase Agreement between CK Holdings, Fiat and MM Italy dated October 20, 2018 ('SPA'). CK Holdings and Fiat Entities have been collectively referred to as 'Parties'.

CK Holdings is present in India through Calsonic Kansei Motherson Auto Products Limited ('CK Motherson'), which is a joint venture between Calsonic Kansei Corporation and the Samvardhana Motherson Group. CK Holdings is wholly held and controlled by investment funds advised or managed by affiliates of KKR and Co. ('KKR') (a global investment firm). In addition to CK Motherson, KKR also holds shares/control over certain enterprises engaged in automotive components business in India namely, LS Auto, LS Automobiles India Private Limited and Tekfor. On the other hand, the Fiat Entities are engaged in the manufacture and sale of automotive components and are present in India through a wholly owned subsidiary of MM Italy namely, Magneti Marelli India Private Limited and also through certain joint ventures.

Therefore, activities of Parties to the Proposed Combination relate to the automotive components business, which may be segmented into broad categories, which can further be sub-segmented into various modules and/or components. These modules/components can be classified on the basis of the type of vehicles viz., light vehicles, two wheelers etc., for which automotive components are manufactured. CCI noted that while the Parties overlap in five broad categories in India i.e., body electronics, heating, ventilation and air conditioning ('HVAC'), human machine interface electronics ('HMI'), lighting, and powertrain; there are no market facing overlaps at component/module level.

CCI also considered the following potential vertical relationships in India at the module lev-

<sup>11</sup> Combination Registration No. C-2019/01/633

<sup>12</sup> Combination Registration No. C-2019/01/639



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el: (i) Body Control Module ('BCM') components and BCM modules emanating from upstream supply of these components by CK Motherson and the downstream manufacture of BCM modules by Fiat Entities; and (ii) headlamps and front end modules emanating from upstream sale of headlamps by Fiat Entities and the downstream sale of front end modules by CK Motherson. However, considering that CK Holdings is not engaged in any market facing activities in relation to the concerned products, CCI concluded that the Proposed Combination is unlikely to result in an appreciable adverse effect on competition ('AAEC').

Keeping the above mentioned factors in mind, CCI approved the Proposed Combination.

### **CCI Approves Acquisition by UV Asset Reconstruction Co. Limited of Aircel Limited and its Subsidiaries**

On March 7, 2019, CCI approved the proposed acquisition by UV Asset Reconstruction Company Limited ('UV ARC') of 74% of the entire paid up share capital each of Aircel Limited and its two wholly owned subsidiaries, Aircel Cellular Limited and Dishnet Wireless Limited, ('Aircel Targets') ('Proposed Combination').<sup>13</sup> UV ARC and Aircel Targets have been collectively referred to as 'Parties'.

The notice to CCI was filed pursuant to a resolution plan dated December 29, 2018, under the Insolvency and Bankruptcy Code, 2016. Aircel Targets voluntarily filed an application for insolvency with the National Company Law Tribunal ('NCLT'), Mumbai Bench on February 28, 2018.

UV ARC is an asset reconstruction company engaged in the business of acquiring non-performing assets from banks and financial institutions and resolving the assets acquired with a resolution strategy as it deems fit. Aircel Targets were engaged in the provision of telecommunication services in mobile telephony services, internet/data services and mobile wallet services across India and were stated to not be in operation for the past eight to nine months.

CCI noted that none of the companies in which UV ARC held investments have any horizontal or vertical overlaps with the Aircel Targets and accordingly approved the Proposed Combination.

### **CCI Approves Collective Acquisition of Ruchi Soya Industries Limited by Patanjali Ayurved Limited, Divya Pharmacy, Patanjali Parivahan Private Limited and Patanjali Gramodhyog Nyas**

On March 6, 2019, CCI approved the acquisition of the majority of equity share capital of Ruchi Soya Industries Limited ('RSIL') by Patanjali Ayurved Limited ('PAL'), Divya Pharmacy ('Divya Pharmacy'), Patanjali Parivahan Private Limited ('PPPL') and Patanjali Gramodhyog Nyas ('Patanjali Gramodhyog') ('Proposed Combination').<sup>14</sup> PAL, Divya Pharmacy and PPPL are together referred to as 'Patanjali'. Patanjali and RSIL are together referred to as 'Parties'. The notice to CCI was filed in pursuance to the resolution plan dated May 2, 2018 submitted by Patanjali in relation to RSIL, which is presently undergoing corporate insolvency resolution process initiated under the Insolvency and Bankruptcy Code, 2016.

PAL is a diversified consumer good company engaged, *inter alia*, in the manufacture and marketing of ayurvedic and medicinal products, food products, breakfast cereals, dairy products, edible oil, packaged water and beverages. Divya Pharmacy is present in the business of Ayurvedic formulations as well as therapeutic segments, including the manufacture of traditional medicine. PPPL is a logistics services entity which provides transportation and logistics services on a captive basis to various entities within the Patanjali group. Patanjali Gramodhyog is engaged in developing products and facilities for cattle welfare. On the other hand, RSIL is engaged in the business of manufacture and marketing of edible oils, soya foods and oil derivatives.

CCI observed that the activities of Patanjali and RSIL overlap horizontally in the market for sale of: (i) edible oils; and (ii) soya foods. Within the broader soya foods market, Patanjali and RSIL overlap horizontally in the following products: soyabean oil, sunflower oil, mustard oil and rice bran oil. For the purpose of the assessment, these by-products were also classified as separate sub-segment as there is limited degree of substitutability considering the difference in usage, cooking pattern *etc.* In this regard, it was stated by Patanjali that the Parties exhibit horizontal overlap in the market for sale of soya chunks/ granules.

CCI also observed that PAL and RSIL have entered into various packing and processing agreements for edible oil because of which there may be potential vertical overlaps between the Parties in the following areas *i.e.*, (i) supply of soya flour (upstream) and manufacturing of soya chip/katories (downstream); (ii) supply of oleo chemicals (upstream) and manufacturing

<sup>13</sup> Combination Registration No. C-2019/02/642

<sup>14</sup> Combination Registration No. C-2019/01/631

of bathing soap (downstream); and (iii) supply of bakery fats (upstream); and manufacturing of biscuits (downstream). CCI did not, however, delineate a relevant market observing that the Proposed Combination was unlikely to cause an AAEC in any of the possible alternative relevant markets that may be delineated.

Having regard to: (i) the market share of the Parties in broader segments of edible oils and soya foods as well as in the sub-segments of soyabean oil, sunflower oil, mustard oil and rice bran oil; (ii) fragmented nature of Indian edible oils market; (iii) the presence of a number of organized as well as local and unorganized players in the Indian edible oils market; (iv) low entry barriers; and (v) high reliance on imports, CCI approved the Proposed Combination. CCI noted that the existing and potential vertical relationships between the Parties were unlikely to cause any concerns due to the lack of ability and incentive to foreclose competition in any of the markets by the Parties.



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## **Delhi High Court Clarifies Powers of CCI and Director General to Initiate Criminal Proceedings under Section 42(3) of the Act for Non-compliance of its Orders and Directions**

On March 29, 2019, the Delhi High Court ('DHC') passed a judgment in the matters of **M/S Rajasthan Cylinders and Containers Ltd. v CCI**<sup>15</sup>, **Shri Jose C. Mundadan v. State and Anr.**<sup>16</sup> and **Jose C. Mundadan v. Government of NCT of Delhi and Anr.**<sup>17</sup> (the three writ petitions are collectively referred to as 'Petitions'). By way of this judgment, the DHC refrained from interfering with the non-compliance criminal proceedings initiated by CCI against Rajasthan Cylinders and Containers Limited ('RCCL'), Film Distributors Association, Kerala ('FDA') and Mr. Jose C. Mundadan in his capacity as the Honorary General Secretary of FDA, (collectively referred to as 'Petitioners'), under Section 42(3) of the Act. These proceedings were initiated separately against the Petitioners before the court of the Chief Metropolitan Magistrate, New Delhi ('CMM'). The writs filed by each of the Petitioners were heard together by the DHC.

- A. **RCCL ('Petition 1')** CCI instituted a criminal complaint under against RCCL for failure to pay penalty imposed by CCI for non-compliance with the Director General ('DG') and CCI's directions in certain *suo moto* proceedings initiated by CCI.
- B. **FDA and Mr. Jose C. Mundadan ('Petition 2 and Petition 3')** CCI instituted a criminal complaint against FDA through Mr. Jose C. Mundadan and against Mr. Jose C. Mundadan, in his capacity as the Honorary General Secretary of the FDA for failure to pay penalty imposed by CCI and comply with DG's directions.

The Petitioners challenged the jurisdiction of CCI in initiating criminal proceedings for failing to pay the penalty imposed by CCI and comply with directions of DG. It was argued that the penal clause leading to such criminal action in the court of CMM under Section 42(3) of the Act: (i) was not intended to cover non-compliance of orders directing payment of penalty; (ii) only dealt situations arising out of non-compliance of orders of CCI and not the DG; and (ii) would lead to double jeopardy, which is prohibited under Article 20(2) of the Constitution of India.

DHC clarified that the cause of action for criminal complaint to be filed in the court of CMM arises in two possible situations: (i) failure to 'comply with the orders or directions' issued under the law; or (2) failure to pay fine imposed for non-compliance with orders or directions of CCI under specified provisions (*i.e.*, Sections 27, 28, 31, 32, 33, 42A and 43A of the Act), with CCI finding absence of 'reasonable cause' after inquiry. DHC held that legislature intended the offence under Section 42(3) of the Act to have a larger sweep, covering failure to comply with the orders or directions issued under the law, including failure to pay penalty, irrespective of whether they had been issued by CCI or by its functionaries, like DG-CCI.

As for the argument on double jeopardy, the DHC relied on **Union of India & Anr. v. Purushottam**<sup>18</sup>, and held that the imposition of penalty under Section 43 of the Act is civil in nature and imposed by the statutory authority (CCI) in exercise of powers conferred on it by the Act. However, the criminal action by CCI (*i.e.*, alleging an offence under Section 42(3) of the Act) carries an additional element of failure to comply further with the said directions/orders. On this basis, DHC held that such an action did not violate Article 20(2) of the Constitution of India and rejected the Petitions for these reasons.

15 CrI. M.C. 4363/2018

16 CrI..M.C. 5324/2018

17 CrI. M.C. 5371/2018

18 (2015) 3 SCC 779



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## Delhi High Court Rules on the Constitutionality of Certain Provisions of the Act in its Auto Parts decision

On April 10, 2019, a division bench of the DHC, comprising of Justice Ravindra Bhat and Justice Prateek Jalan, ('**Bench**') pronounced its landmark judgement in relation to the petitions filed by original equipment manufacturers ('**OEMs**') of passenger cars ('**Petitions**')<sup>19</sup>. The Petitions challenged the constitutional validity of certain provisions of the Act and associated regulations. Specifically, Sections 8, 9, 15, 17, 22, 26, 27(b), 17, 36, 53A, 53B, 53C, 53D, 53E, 53F, 53T, 55, 56 and 61 of the Act, and Regulations 37, 41, 44, 45 and 48 of the Competition Commission of India (General) Regulations, 2009 ('**General Regulations**'), (together, the '**Impugned Provisions**') were challenged, along with two orders of the CCI dated April 26, 2011 and August 25, 2014.

### Background

The genesis of the Petitions relates to information filed with CCI by Mr. Shamsheer Kataria ('**Informant**') against Honda SIEL Cars India Limited, Volkswagen India Private Limited and Fiat India Automobiles Limited. On February 24, 2011, by way of a *prima facie* order under Section 26(1) of the Act, CCI directed its DG to conduct an investigation based on the Informant's allegation that the three OEMs placed restrictions on: (i) their authorized dealers from making over-the-counter sales of their spare parts and diagnostic tools; and (ii) the supplier of the spare parts making direct sales in the market. The Informant had alleged that such practices limited consumer choice and raised the prices of repair and maintenance services of the OEMs' cars. On April 26, 2011, CCI passed an order accepting the DG's request to expand the scope of the investigation to include 11 other OEMs ('**First Order**'). On August 25, 2014, based on the submissions of the OEMs and the DG's investigation report, CCI held that the OEMs had contravened Section 3(4) (Prohibition against Anti-Competitive Vertical Agreements) and Section 4 (Prohibition of Abuse of Dominance) of the Act, *inter alia*, for restricting supply of their spare parts in the market ('**Final Order**'). CCI imposed a penalty of 2% of the total turnover in India for three financial years (2007-08, 2008-09 and 2009-10) on each of the 14 OEMs, along with directions which, *inter alia*, included the standardization of spare parts across brands, and access to diagnostic tools and spare parts of the OEMs to all independent repairers.

### DHC's Issue-Wise Findings

10 of these OEMs (*viz.*, Mahindra, Tata Motors, General Motors, Mercedes Benz, Skoda, Honda, Volkswagen, Hindustan Motors, Fiat and BMW) filed a writ petition before the DHC on the constitutional validity of the Impugned Provisions, and on that basis, the validity of CCI's First Order and Final Order. Based on the submissions in the Petitions and those by CCI, the Bench delineated six issues for consideration:

- i. **Whether CCI is a tribunal exercising judicial functions:** The Bench held that unlike a tribunal which performs purely judicial functions, CCI is a body that is in part administrative, expert (when discharging advisory and advocacy functions) and quasi-judicial (when it determines the rights and liabilities of parties by way of issuing final decisions, directions and penalties, after the conclusion of the DG's investigation), and does not perform exclusively adjudicatory functions.
- ii. **Whether the composition of CCI violates the constitutional principles of separation of powers:** The Bench held that to examine whether a particular law violates the 'separation of powers' principle, the Court is required to examine if the executive branch or any other branch usurps an essential judicial function. Based on the reasons provided below, the Bench held that there was no violation of the separation of powers principle in the present case:
  - **Comparison with other regulatory bodies:** The Bench made reference to other commissions and Tribunals, including the Securities and Exchange Board of India ('**SEBI**'), the Telecom Regulatory Authority of India ('**TRAI**'), and the Central Electricity Regulatory Commission ('**CERC**'). It observed that different specialized bodies follow different models, and there is no 'one size fits all' approach or a tipping point, where regulatory models are considered ideal. Accordingly, the Bench held that since CCI performs multiple tasks as stipulated by the Act (advisory, advocacy, investigation and adjudication), it is not necessary for CCI or the appellate tribunal to necessarily comprise entirely of lawyers or those possessing judicial experience or those entitled to hold office as judges, to conform with the Constitution (however, please see the point on composition of CCI below).
  - **Exclusion of jurisdiction of Civil Courts (Section 61 of the Act):** The Bench noted that CCI does not decide a traditional *lis* (dispute), which is premised on an adversarial proceeding, like a Court. Therefore, no party has the absolute right



to demand that a dispute is to be adjudicated only by a Civil Court. The Bench relied on a previous judgement of the Supreme Court that had examined similar considerations in relation to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and found it to be constitutional. For these reasons, Section 61 was held valid.

- **Exclusion of the scrutiny of High Courts (Section 53T of the Act):** Section 53T, which provides for an appeal from an order of the appellate tribunal to be made directly to the Supreme Court (excluding scrutiny by the High Court altogether), was held to be valid. While the Bench acknowledged that there may be some merit in allowing an appeal from a decision of the appellate tribunal to the High Court, the same is insufficient to hold a section unconstitutional.
- **Composition of CCI (Section 8 of the Act):** Under the Act, CCI is presently required to be comprised of members with qualifications and expertise in diverse fields (including legal). It is not mandatory for CCI to have a judicial member. The Bench held that this does not satisfy the test of constitutionality as set by the Supreme Court in **State of Gujarat v. Utility Users Welfare Association**<sup>20</sup> which requires the presence and participation of a judicial member at all times when adjudicatory orders (especially final orders) are made by CCI. Accordingly, the Bench read into Section 8 of the Act the requirement for CCI to mandatorily have a judicial member at all times.
- **Selection procedure of CCI Members (Section 9 of the Act):** The Bench observed that under Section 9 of the Act, the selection committee consists of five members, including the Chief Justice of India (or his nominee) as the Chairman, and two outside independent experts. Accordingly, the Bench held that the Act provided sufficient safeguards to ensure that the executive does not dominate the selection process of CCI members, by mandating the five-member selection committee to be chaired by the Chief Justice of India (or his nominee) and two independent experts.
- **Tenure of CCI Members and supersession by the Central Government (Sections 11, 55 and 56 of the Act):** The Petitions had alleged that Sections 55 and 56 of the Act violated the principle of 'separation of powers' since they allowed the Central Government to issue directions to CCI and supersede it in the event the Central Government perceives that CCI is unable to discharge its functions. The Bench stated that similar provisions have been made by the Parliament in other regulatory enactments, and therefore Sections 55 and 56 were not specific to the Act. Further, Section 11(3) of the Act safeguards the tenure of CCI members from any arbitrary removal by the Central Government as it requires the Central Government to seek the permission of the Supreme Court before removing a CCI member. Accordingly, Section 11 was held to be valid.
- **Constitution of the Appellate Tribunal (Section 53D of the Act):** The Bench has opined that the Chairman of the appellate tribunal should be a former Supreme Court judge or a Chief Justice of a High Court, which will sufficiently guarantee the application of a judicial mind, and judicial principles to the issues brought before that Appellate Tribunal. The Bench also observed that the provisions relating to Appellate Tribunal contained in regulatory enactments in various sectors (telecom, electricity, airports, securities *etc.*) follow an identical pattern.
- **Composition of the selection committee of the Appellate Tribunal (Section 53E):** The Bench drew a distinction between the Appellate Tribunal for competition law from other regulatory tribunals, finding that the former has the ability to not merely adjudicate on appeals, but to also award compensation for damages. The Bench held that the composition of the selection committee has to be in accordance with the law laid down by the Supreme Court in the two Madras Bar Association cases, (*i.e.*, **Madras Bar Association v. Union of India**<sup>21</sup> and **Madras Bar Association v. Union of India**<sup>22</sup>) and in **Swiss Ribbons Pvt. Ltd. v. Union of India**<sup>23</sup>, *i.e.*, the Chief Justice or her/ his nominee should have a final say in the matter of selection, with the right to have a casting vote. Accordingly, the Bench held that Section 53E of the Act, as it stood, before the amendment by the Finance Act, 2017 ('Finance Act'), is unconstitutional since it renders the Chief Justice a minority in the selection committee. However, the Bench has clarified that this observation was not determinative and is subject to the Supreme Court's deci-

20 2018 (6) SCC 21

21 (2014) 10 SCC 1

22 2015 (8) SCC 583

23 2019 SCC OnLine SC 73



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- sion in **Central Administrative Tribunal v. Union of India**<sup>24</sup> – where certain provisions of the Finance Act have been challenged.
- iii. **Whether CCI's decision-making process under Section 22(3) and the revolving door practice (whereby any members of CCI can participate in any proceeding at any given point of time) is unconstitutional:**
- The Bench noted that a casting vote (by the CCI chairman), which may potentially lead to an adjudicatory result is unconstitutional. It held that the principle of giving equal weight to the decisions of each participant of a quasi-judicial tribunal is destroyed by Section 22(3) of the Act, and therefore declared it to be void. The Bench however upheld the proviso to Section 22(3) of the Act, which mandates a minimum quorum of three members (including the Chairman) for any meeting of CCI where an adjudicatory decision is made.
  - With respect to the 'revolving door policy' which Section 22(3) of the Act permits, the Bench held that the mere possibility of abuse of power is not a ground to hold a provision of a law as arbitrary. Determination of whether a concerned party has been prejudiced by a 'revolving door' would depend on the facts and circumstances of each case. Referring to the facts of the case, the Bench held that the mere fact that another subsequent member participated in two intervening hearings, but was not a party to the final decision, did not in itself amount to a violation of principles of natural justice. Having so concluded, the Bench was nevertheless of the opinion that a hearing by a larger body and decision by a smaller number (for compelling reasons or otherwise) leads to undesirable and possibly avoidable situations. To address this, the Bench issued certain directions to CCI and suggestions to the Central Government (set out in point vii below).
- iv. **Whether the First Order, expanding the scope of the inquiry and notice under Section 26(1), was passed in an illegal and in an 'overboard' manner:** The Bench relied on the Supreme Court's decision in **Excel Crop Care Limited v. Competition Commission of India**<sup>25</sup> ('Excel Crop') to observe that it is well within the DG's powers to investigate against persons not mentioned in the information or a *prima facie* order under Section 26(1) of the Act. This is because the subject matter included in the *prima facie* order includes not only the issues alleged, but other allied and unspecified issues as well. The Bench also noted that at the *prima facie* stage, CCI may not necessarily have all information or material in respect of the parties' conduct which affects competition in the market, and therefore it is within CCI's power to expand the scope of inquiry to include other allied issues and parties.
- v. **Whether Section 27(b) of the Act, which empowers CCI to impose a penalty as 'it may deem fit', is unconstitutional and the Final Order arbitrary since no separate hearing on penalty was provided to the petitioners:** Differentiating the petitioners' allegation (that the Final Order was arbitrary since there was no separate hearing on penalty) from previous Supreme Court precedents, the Bench held that the need for a separate hearing on penalty is undermined in the present case since CCI followed all the steps indicated in the statute, and did not adopt an unfair procedure in not granting a separate hearing on penalty. The Bench stated that at the time of submitting their written and oral arguments on the DG's report, the parties are aware of the range of findings and/or sanctions that CCI can impose, as well as the statutory cap (of not more than 10%) on the quantum of penalty. The Bench further stated that the statute did not compel CCI to adopt an unfair procedure (*i.e.*, the absence of a second specific hearing before imposition of penalty). Therefore, Section 27 could not be held as arbitrary or unconstitutional.

Further, the Bench issued the following directions:

- CCI is to frame regulations to ensure that 'one who hears decides' is embodied in letter and spirit in all cases where final hearings are undertaken and concluded, *i.e.*, once final hearings in any complaint or batch of complaints begin, the membership should not vary, and a matter should preferably be heard by seven or at least, five members;
- After the commencement of a hearing, all CCI members who have commenced hearing the case must continue to be a part of the proceeding, all hearings must be conducted *en banc*, and every member who participates in the hearings must also be a party to the final order(s);
- No CCI member should be allowed to take a break during a hearing to rejoin later as this would violate the principles of natural justice and undermine public con-

24 W.P.(C) 640/2017

25 Civil Appeal No. 2480 Of 2014

- fidence in CCI's functioning;
- The Central Government is to take expeditious steps to fill all existing vacancies in CCI within six months;
  - CCI is to ensure that at all times, during the final hearing, the judicial member is present and participates in the hearing; and
  - In all cases, at the final hearing stage, the parties have to: (i) address arguments taking into consideration the factors indicated by the Supreme Court in Excel Crop and any other relevant factors; and (ii) make submissions on imposition of penalty and mitigating factors, without prejudice to the other submissions.

The Bench also allowed the petitioners to approach the appellate tribunal within six weeks, and directed the appellate tribunal to admit the appeal(s) on merits, without raising any objection on limitation.

### **Implications**

The Bench has held Section 22(3) of the Act (with the exception of the quorum rule), which forms the basis on which CCI takes all decisions, including adjudicatory decisions, to be unconstitutional. Moreover, in light of the Bench's direction that the minimum quorum for a CCI hearing should be five members (with at least one judicial member), and given that CCI is currently composed of three members (with no judicial member), the Central Government will need to fill up vacancies at CCI. CCI will be constrained from hearing or passing any order of an adjudicatory nature (including final orders) absent a judicial member, until the time the remaining members are appointed by the Central Government.



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