



Indian Competition Law: Awaiting Judgment

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INTRODUCTION

Competition law in India has been enacted by the Indian Parliament in the form of the Competition Act, 2002 (“Act”), which came into force on May 20, 2009. The merger control provisions of the Act were subsequently brought into force in June 2011. The Act provides for the establishment of a specialized investigative and quasi-judicial body, the Competition Commission of India (“CCI”) along with its investigative arm (i.e. the office of the Director General (“DG Office”) to investigate and adjudicate upon contraventions of the Act. A judicial appellate body in the form of the Competition Appellate Tribunal (“COMPAT”) is also established to exercise oversight over the decisions of the CCI.

The Act provides for appeals from certain decisions of the CCI to the COMPAT. Decisions of the COMPAT can then be further appealed before the Supreme Court of India (“Supreme Court”). However, such appeals to the Supreme Court would only be entertained on a point of law. During these seven years of competition law enforcement in India, only a handful of cases have been appealed before the Supreme Court (certain matters are also being litigated before various High Courts — on issues pertaining to the CCI’s jurisdiction). However, the floodgates at the COMPAT now seem to be open. An analysis of the cases filed before, argued and disposed of by the COMPAT indicates a clear enforcement priority: application of competition law principles is a must, but not at the cost of due process.

The principles of due process form the bedrock of any justice dispensation arrangement and are integral to any formal legal system. The Constitution of India, 1950 (“Constitution”) provides for the basics that all administrative agencies must follow while exercising their decision-making powers and this includes adherence to the principles of natural justice. While due process, as a concept, is derived from common law principles, it is an indispensable component of India’s justice delivery system and by way of precedents, the Honorable Supreme Court has established that it is imperative for judicial, quasi-judicial and administrative authorities in India to follow due process in all their proceedings. For instance, in the seminal case of *Maneka Gandhi v. Union of India*² the Supreme Court emphasized the importance of adoption of “fair, just and reasonable” procedure by judicial and administrative authorities. The Act is no exception to this rule.





Section 36(1) of the Act unequivocally provides that while the CCI has the power to regulate its own procedure, it shall be guided by the principles of natural justice in the exercise of its powers. Further, regulations that supplement the Act also lay down that the CCI and the office of the DG must adhere to the principles of natural justice while dealing with enforcement proceedings. The Supreme Court's seminal judgment in *Competition Commission of India v. Steel Authority of India Limited*³ ("SAIL Case"), forms the foundation of Indian jurisprudence in the field of competition law and due process. The Supreme Court while examining the scheme of the Act, held that the CCI being a quasi-judicial authority, is bound by the principles of natural justice. Subsequently, the COMPAT has followed and subscribed to the Supreme Court's precedent in the SAIL Case and in a series of judgments, emphatically opined that the CCI is obliged to adhere to the principles of natural justice.

However, despite the abovementioned unambiguous provisions of law and clear mandate from the Supreme Court, there have been instances in the recent past where the CCI has deviated from the principles of natural justice in its proceedings and not followed due process of law. It would appear that the CCI, its eagerness to meet justice on the perceived merits of a case, often overlooks certain basic due process principles that ought to be followed. As a result, the affected parties in such instances have challenged the decisions of the CCI before the appellate authority on the very basis of non-compliance with principles of natural justice; with the merits of the case forming a second ground of appeal.

Based on an analysis of recent proceedings before the COMPAT, it would appear that the COMPAT is the sentinel of due process in the Indian competition law adjudicatory system and spends majority of its time in setting the CCI's house in order, by way of directions and strictures in respect of the decision-making process required to be adopted by the CCI. This is also an approach that is expected from the COMPAT, as a retired Judge of the Supreme Court or the Chief Justice of a High Court, with years of experience in a court of law, is at the helm of its affairs and presides over the proceedings before the bench.

JUDICIAL REVIEW OF CCI DECISIONS

This article analyses recent cases where decisions of the CCI have been tested at the altar of due process compliance and excesses or shortcomings of the CCI have been corrected at the appellate forum.

Recently, the CCI's well publicized and significant order in the case of *Builders Association of India v. Cement Manufacturers Association & Ors.*⁴ ("Cement Cartel Case"), wherein a cumulative penalty of INR 63,070 million (approx. USD 945 million) was levied on the 11 cement companies found guilty of cartelization by the CCI, was set aside in entirety and remanded to the CCI for fresh hearings and adjudication on the following grounds:⁵

(a) The CCI Chairman, who initialed every page of the CCI Order and in all likelihood authored the CCI Order, was absent during the oral hearings held before the CCI. Accordingly, the CCI Order was vitiated due to the violation of the rule that "only one who hears can decide."

(b) The views and statements of the CCI Chairman were widely reported in several newspapers and the CCI proceeded with the case with a pre-determined mind to penalize the cement manufacturers and publicize the role of the CCI. Such conduct by the CCI violates the principle that justice should not only be done but should manifestly and undoubtedly be seen to have been done.

Citing a host of decisions by the Indian courts, the COMPAT observed that commissions, tribunals and other administrative bodies who have the power to adjudicate upon the rights of the parties or pass orders adversely affecting a person or imposing penalty, were required to act justly, fairly and in accordance with the principles of natural justice. Additionally, the requirement that the CCI abide by the principles of natural justice has been "statutorily engrafted in the scheme of the Act" by way of Section 36, which stipulates that the CCI





“shall” be guided by the principles of natural justice.

The *All India Organization of Chemists and Druggists v. Competition Commission of India*⁶ (“AIOCD Case”) was the first instance in which the COMPAT took cognizance of the procedural anomaly in relation to signing of the orders of the CCI. In this case, the final order of the CCI was signed by members who were not present during the hearing before the CCI on February 27, 2014. Further, two of the five CCI members who had signed the order had not even joined CCI on the date of the hearing. The COMPAT, relying on landmark Supreme Court precedents, observed that “*an order passed by a person who had not heard the arguments offends the principle of judicial procedure*”⁷. Further, the COMPAT observed that “[...] *personal hearing enables the authority concerned to watch the demeanor of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality*”⁸. The COMPAT noted that “[...] *two of the five members who signed the impugned order had joined the Commission after more than 1.5 months of the date of hearing. Therefore, the only possible inference which can be drawn is that they had mechanically signed the impugned order and such an order cannot but be treated as vitiated due to the flagrant violation of the basics of natural justice.*”

Interestingly, on account of this *modus operandi* of the CCI whereby there is a disconnect between the CCI members that are present for hearings and the members that pass or sign the final order, Sections of the Act that allow for such a procedure are themselves being challenged in proceedings before the Delhi High Court. This issue has been raised on an appeal against the decision of the CCI in the *Automobile Spare Parts Case*,⁹ where the CCI had fined 14 auto parts manufacturers for abusing their dominant position. The appellants argued that Sections 22 and 27 of the Act, which contain provisions for the conduct of meetings of the CCI and imposition of penalty, respectively, are *ultra vires*. During the final hearings of this matter before the CCI, while 7 members of the CCI heard the arguments advanced by the parties, the final order finding the spare parts manufacturers in violation of Section 4 of the Act was pronounced by only 3 members.¹⁰ While this was in accordance with the provisions of Section 22 of the Act, which stipulates that a quorum for the purposes of an ordinary meeting of the CCI should comprise 3 members, the same is not in consonance with the practice established and followed in every judicial system wherein each judge who hears the case must be party to the final order determining the rights of the parties.

In early 2015, the COMPAT also set aside (in entirety) an order passed by the CCI against the Board of Control for Cricket in India (“BCCI”) (*Board of Control for Cricket in India v. Competition Commission of India*¹¹ (“BCCI Case”),¹² on the ground of violation by the CCI of principles of natural justice in arriving at its final decision. By way of background, the BCCI filed an appeal before the COMPAT in relation to the CCI’s order dated February 8, 2013 that held the BCCI to be dominant on account of the regulatory nature of its role, monopoly status, control over infrastructure, ability to control entry of other leagues, historical evidence, etc. The CCI held that based solely on Clause 9(1)(c)(i) of the Media Rights Agreement (“Media Rights Clause”), the BCCI has abused its dominant position under Section 4(2)(c) of the Act by undertaking not to organize, sanction, recognize any other private professional domestic league/event that could compete with the Indian Premier League (“IPL”). The CCI concluded that such a practice resulted in the denial of market access to any potential competitor of IPL looking to establish a competing private professional cricket league or event, and imposed a penalty of INR 522.4 million (approx. USD 8 million) on the BCCI for abusing its dominant position. The specific grounds on which the COMPAT found the CCI to be in breach of the due process requirement in this case, are discussed below:

(a) The BCCI was only given an opportunity to address the views formed by the DG in relation to the definition of relevant market. However, the CCI, in its order, relied on an analysis and definition of the relevant market that was manifestly different from the definition of the relevant market in the DG’s report. As such, the BCCI never had an opportunity to contest the relevant market definition that formed the basis of the CCI’s





decision. The COMPAT viewed this as a violation of the principles of natural justice as the BCCI was not heard in relation to the specific allegation on the basis of which it was found guilty.

(b) In order to strengthen the basis of its definition of the relevant market, the CCI relied on new information, which did not form part of the information that the BCCI had access to. While such information was largely publicly available — none of it was provided to the BCCI before the CCI proceeded to rely on it for the determination of the relevant market.

(c) Finally, the Media Rights Clause was neither identified by the DG as a violation of the Act in the DG report, nor raised as an issue by the CCI during its inquiry and hearings. As such, the BCCI was denied an opportunity to controvert the CCI's analysis. The BCCI argued that the CCI's finding in relation to this Media Rights Clause suffered from lack of sound reasoning, resulting not only in the violation of principles of natural justice but also a complete failure of justice and non-application of mind.

Pursuant to a detailed assessment, the COMPAT set aside the CCI's order as legally unsustainable and criticized the CCI for its clear breach of due process principles. The COMPAT criticized the CCI for its lack of due process and procedural fairness in relation to the investigation and unequivocally held that before issuing any adverse decision, the CCI must comply with the principles of natural justice, including following the rule of *audi alteram partem* and give an effective opportunity of hearing to the party against whom an adverse decision has been issued. Notably, the COMPAT also held that a defendant should not only be granted an opportunity to refute the allegations leveled against it but also the evidence (including any new information that is not part of the DG's Report) that is used to support such allegations. The COMPAT also observed that the CCI should pass speaking orders to indicate its application of mind to the relevant factors considered in assessing an alleged violation of the Act. Prior to the BCCI Case as well, the COMPAT had issued a clear mandate that the lack of reasoning in orders passed by judicial and quasi-judicial bodies amounts to the violation of principles of natural justice and due process. For instance, in *M/s DLF Limited v. Competition Commission of India & Ors.*¹³, the COMPAT noted that the CCI had not provided a detailed order and remanded the case back to the CCI, requiring it to provide details in relation to the extent and manner of modification of the impugned agreement in question. Despite this clear mandate, the CCI faltered in the BCCI Case, which the COMPAT remanded to the CCI for fresh disposal in accordance with law.

In the AIOCD Case mentioned above, the COMPAT also commented on the violation of the rule of proportionality, which is covered within the ambit of principles of due process. By way of background, the DG had sought information from AIOCD on multiple occasions in relation to three complaints filed against AIOCD on substantially similar grounds. The information sought by the DG was similar for all the three investigations against AIOCD. Therefore, AIOCD argued that the required information was already submitted to the DG pursuant to the direction issued by the DG in relation to the second complaint and such information was sufficient for the purposes of the DG's investigation report in all three cases. However, the DG issued a show cause notice under Section 43 of the Act for non-compliance with the DG's directions in relation to the first complaint. While the DG completed its investigation in all the three cases and submitted an investigation report to the CCI, the CCI nonetheless levied a penalty on AIOCD at the rate of INR 25,000 (approx. USD 375) per day till the submission of the requisite information. Furthermore, the CCI miscalculated the number of days for which the violation persisted and continued to impose penalty for a period even after completion and submission of the DG report itself. The COMPAT reviewed the penalty imposed and held that the CCI had violated the principle of proportionality in ample measure by miscalculating the duration of non-compliance and extending the same to a period post submission of the DG report.





INDIAN COMPETITION LAW AND THE COURTS

The cases discussed above expose the CCI's shortcomings in its handling of matters from an administrative and due process perspective. While this is being remedied case-by-case at the COMPAT, there are certain inherent grey areas in the Act and regulations itself, which often results in the courts of India needing to step-in and take cognizance of purely competition law related disputes. For instance, the Act does not contemplate a scenario where the CCI can pass an order finding no contravention of the Act when the DG in his report has found the parties to be contravening the provisions of the Act. Accordingly, no right of appeal to the COMPAT is also provided for such a scenario. Given that the CCI is the adjudicatory authority under the Act, it is difficult to fathom that the legislature did not intend to assign the CCI the power to pass an order disagreeing with the conclusions of the DG. The CCI, in its wisdom, has not considered itself to be restrained by such a lacuna in the Act and has in certain cases found parties to be not guilty of a contravention despite findings in the DG report to the contrary.¹⁴ Upon appeal, the COMPAT has taken a strict interpretation of the Act and held that the right of appeal is a creation of statute and as such, only orders passed under the provisions listed in Section 53 (A)(i)(a) of the Act can be appealed before the COMPAT, rendering the parties remediless.¹⁵ In one such case (*Jyoti Swaroop Arora v. Competition Commission of India & Ors.*)¹⁶, the High Court of Delhi is now seized of the issue of whether a right to appeal to the COMPAT is to be read into the provisions of the Act for such a scenario, or does the remedy lie directly before the courts of India.

There have also been instances where the exercise of investigative and penal powers of the CCI have been called in question before the Indian courts. For instance, the first dawn raid in India was conducted by the CCI in September 2014 at the registered and corporate offices of M/s JCB India Limited ("JCB") in relation to an abuse of dominance investigation. Subsequent to the dawn raid, JCB approached the High Court of Delhi that considered the manner in which the action was undertaken by the CCI and asked the DG to file a personal affidavit on the reasons that prompted him to take the "drastic action." At the outset, a warrant to conduct such a dawn raid is required to be obtained by the DG office from a Chief Metropolitan Magistrate and thereafter the calling into question of the DG's jurisdiction to conduct such raid certainly undermines the efficacy of the CCI's investigative wing. The DG investigation in this matter was stayed by the High Court on account of litigation pending before the courts between the party that filed a complaint with the CCI and JCB. The High Court of Delhi also stayed CCI's penalty of INR 10 million (approx. USD 150,000) on Google, which was levied on account of non-cooperation by Google in the CCI's investigative process.

Further, on pleas by defendants in other cases being investigated by the CCI, the High Courts of Delhi¹⁷ and Madras¹⁸ have also granted stay orders on the CCI investigation, significantly undermining the CCI's authority.

KEY TAKEAWAYS

Recent orders of the COMPAT, discussed above, will certainly shape competition law jurisprudence in India and bring the CCI's decision-making process at par with the justice delivery system in traditional courts of law. In order to impart a sense of faith and responsibility in the system, it is vital that CCI orders are in consonance with the law in letter and spirit, substance and procedure. However, a matter of graver concern is the CCI's struggle for jurisdiction with Indian courts and it remains to be seen whether the courts would exercise the necessary judicial restraint in allowing this specialized regulator to fulfill its mandate. An objective assessment would lead to the conclusion that while the CCI's shortcomings in certain aspects of case-handling and procedural justice are apparent, as a fairly new regulator it has certainly proved its mettle as the protector of competition law policy and consumer welfare. Further, given the slew of cases remanded from the COMPAT and CCI orders set aside on grounds of due process, it is expected that the CCI will take immediate remedial action in this regard.





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- 1 Nisha Kaur Uberoi heads the Competition law practice of Cyril Amarchand Mangaldas. The author would like to acknowledge the contribution of senior associate, Shweta Vasani and associates, Neelambara Sandeepan and Arunima Chandra of the competition law practice of Cyril Amarchand Mangaldas.
 - 2 AIR 1978 SC 597.
 - 3 (2010) 10 SCC 744, paragraph 86.
 - 4 Case No. 29 of 2010.
 - 5 The author represented Lafarge India Private Limited and Ambuja Cements Limited in the proceedings before the COMPAT and also subsequent re-hearing before the CCI.
 - 6 Appeal No. 56 of 2014.
 - 7 Appeal No. 56 of 2014.
 - 8 *Union of India v. Shivraj* (2014) 6 SCC 564.
 - 9 Case no. 3 of 2011.
 - 10 W.P.(C) 6610/2014 and W.P.(C) 6634/2014.
 - 11 Appeal No. 17 of 2013.
 - 12 The author represented BCCI before the CCI and COMPAT.
 - 13 Appeal No. 20 of 2011.
 - 14 *Jindal Steel & Power Ltd. v. Steel Authority of India Ltd.* (Case No. 11 of 2009); *Prints India v. Springer India Private Limited & Ors.* (Case No. 16 of 2010); *Arshiya Rail Infrastructure Ltd. (ARIL) v. Ministry of Railway (MoR) & Ors.* (Case No. 64 of 2010, 12 of 2011 and 2 of 2011); *All India Tyre Dealers Federation v. Tyre Manufacturers* (RTPE Case No. 20 of 2008).
 - 15 The COMPAT while arriving at this finding relied on the Supreme Court's judgment the SAIL Case. It is pertinent to note that Supreme Court in the SAIL Case while determining the appealability of a *prima facie* order and not a final order of the CCI adjudicated upon the scope of Section 53A of the Act.
 - 16 W.P. (C) No. 6262 of 2015.
 - 17 W.P. (C) 6610/2014 and W.P.(C) 6634/2014.
 - 18 Writ Appeal No. 340 of 2015.

