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THE DELHI HC UPHOLDS THE VALIDITY OF FINAL ORDERS OF THE CCI PASSED IN THE ABSENCE OF A JUDICIAL MEMBER

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The High Court of Delhi (High Court), in an important decision in *CADD Systems and Services Private Limited v Competition Commission of India* [Writ Petition (Civil) No 6661 of 2019)] dated 17 July 2019, has validated final orders (which are of adjudicatory nature) of the Competition Commission of India (CCI) passed in the absence of a judicial member. Recently, the Division Bench of the High Court in its decision in *Mahindra and Mahindra Limited and Others v Competition Commission of India and Another* [Writ Petition (Civil) No 11467 of 2018] decided on 10 April 2019 (Mahindra decision), had held that in light of the decisions of the Supreme Court of India (SC), inter alia, in *State of Gujarat v Utility Users Welfare Association* [(2018) 6 SCC 21], the CCI must ensure the presence of a judicial member while passing final orders, which are adjudicatory in nature.

In the present case, the High Court held that in the Mahindra decision the Central Government had been directed to fill the vacancy of judicial member within six months, however it could not be assumed that the High Court had interdicted the working of the CCI during this period. The High Court observed that the import of the order in the Mahindra decision was not to interdict the CCI from passing final orders, a principal function of the CCI. The High Court further stated that the functioning of the CCI would be substantially paralysed if it was interdicted from passing final orders.

In arriving at its decision, the High Court relied on a landmark judgment of the SC in *B.K. Srinivasan and Others v State of Karnataka and Others* [(1987) 1 SCC 658] wherein the so called "Ganga Clause" was upheld, ie with the objective to put beyond challenge defects in the constitution of statutory bodies and defects of procedure which do not lead to any substantial prejudice. Section 15 of the Competition Act, 2002 which is comparable in this aspect, in essence, states that no act or proceeding of the CCI would be invalid by reason of any vacancy or any defect in its constitution. Therefore, the High Court concluded that such final orders by the CCI would not be invalidated in the absence of a judicial member.

Comment:

It would be interesting to observe whether the party aggrieved by the decision prefers to challenge or decides to await the decision of the Hon'ble Supreme Court of India which is currently sub-judice and arose out of the Mahindra decision.

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- Manas Kumar Chaudhuri (Partner), Pranjal Prateek (Principal Associate) and Aman Singh Baroka (Associate)

For any queries please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com