
SCRUTINIZING THE SCOPE OF INVESTIGATION BY THE DIRECTOR GENERAL VIS-A-VIS POWERS UNDER THE COMPETITION ACT, 2002

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ABSTRACT

“This paper critically analyses the power of the Director General conferred upon him by the Competition Commission of India through the prima facie order to conduct investigation into contravention of the Competition Act, 2002. The current mechanisms of investigation being followed in India are undefined and ever increasing as is also reflected by the judiciary. To further understand and contrast the undefined scope of power provided to the Director General, the Doctrines of investigation of the European Union and the United States of America have been evaluated. the intent with which the Indian Legislature drafted the Competition Act, 2002 and landmark cases of the Indian Supreme Court have been taken into consideration to establish the unfair consequences of such undefined powers. Lastly, recommendations to act as a check and balance for such powers have been provided.”

INTRODUCTION

The Competition Act, 2002¹ (hereinafter referred to as the Act) is a statute that came into existence to prohibit practices that decline fair competition in the market. The protection of the interests of the consumers and fair market competition form the essence of the act. The Act establishes the Competition Commission of India (hereinafter referred to as CCI) to investigate into any contravention of the Act. The Director General (hereinafter referred to as DG) is the investigative arm of the CCI vested with powers to conduct investigation as authorized by the CCI.

STATUS QUO OF INVESTIGATION MECHANISM UNDER THE ACT

For better understanding of the statutory and investigation process, the following provisions must be taken into consideration. The CCI forms the crux of the inquiry into the existence of an anti-competitive agreement because, it is under the opinion of the CCI that a prima facie case is said to exist. It is in accordance with the broad guidelines laid down under section 19 of the Act² that the CCI determines the existence of a prima facie case.

The existence of a prima facie case is the token to obtain the right to commence investigation. It is provided under section 26 of the Act³ that information from the central government, state government, statutory authority or any other such information intimated to the CCI which would lead to the establishment of a prima facie case is the first step of the process.

In case the CCI believes that there exists no prima facie case, the complaint is dismissed immediately following which the CCI may pass any other orders it sees fit and provide notice of the same to all concerned authorities. However, upon establishing a prima facie case, the DG is directed to commence investigation following which an investigation report containing his findings shall be made to the concerned authorities that approached the CCI initially.

In the case of the DG having found nothing that is in violation or contravention to the provisions of the Act, the CCI opens a window for objections and suggestions from all parties and government bodies involved, after these are addressed, the CCI may close the proceedings or pass any such order it deems fit. The contrary would be to further investigate and inquire into the matter as per the procedure laid down by the Act.

¹ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

² The Competition Act, 2002 § 19, No. 12, Acts of Parliament, 2002 (India).

³ The Competition Act, 2002 § 26, No. 12, Acts of Parliament, 2002 (India).

The DG shall exercise his duties according to the provisions of the Act. Section 36(2) of the Act⁴ lays down some of the powers vested in the DG that are akin to that of a Civil Court alongside section 41 of the Act⁵ which addresses the same. However, section 41(3) of the Act⁶ mentions the provisions 240 of the repealed Companies Act, 1956⁷ and 240A of the repealed Companies Act, 1956⁸ which elaborately deals with the investigation process, handling of documents furnished for inquiry purposes and seizure.

UNDEFINED POWERS OF THE DG

As previously established, the mechanism of commencing an investigation into a matter, the CCI must primarily be of the opinion that there exists a prima facie case against the alleged party. However, by virtue of regulation 20 (4) of CCI (General) Regulations, 2009⁹, the DG is empowered to include in his report all the material that is acquired during the course of investigation. This regulation in conjunction with the Act is silent as to whether the material that falls outside the subject matter of the prima facie order can be investigated by the DG to be included in the report. This often leads to abuse of power by the DG under the garb of curtailing adverse competitive environment in the market.

It is evident through numerous landmark cases that the DG has often overstepped the authority that has been vested in him through the letter of law. At every instance that this occurred, the courts have allowed the same thereby implying the unregulated powers of the DG.

In the case of *Excel Crop Care Limited v. Competition Commission of India & Others*¹⁰ (hereinafter referred to as “Excel Crop”) the Apex Court held that “ However, while carrying out this investigation, if other facts get revealed and are brought to light, revealing that the “persons” or “enterprises” had entered into an agreement that is prohibited by section 3 of the Act¹¹ which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report”.

⁴ The Competition Act, 2002 § 36(2), No. 12, Acts of Parliament, 2002 (India).

⁵ The Competition Act, 2002 § 36(2), No. 41, Acts of Parliament, 2002 (India).

⁶ The Competition Act, 2002 § 36(2), No. 41(3), Acts of Parliament, 2002 (India).

⁷ The Companies Act, 1956 (repealed) § 240, No.1, Acts of Parliament, 1956 (India).

⁸ The Companies Act, 1956 (repealed) § 240A, No.1, Acts of Parliament, 1956 (India).

⁹ CCI (General) Regulations, 2009, Reg. 20 (India).

¹⁰ *Excel Crop Care Limited v Competition Commission of India & Others*, 2017 8 SCC 47 (SC).

¹¹ The Competition Act, 2002 § 3, No. 12, Acts of Parliament, 2002 (India).

It was through this case that the Supreme Court paved the way for unregulated investigative powers of the DG. This set a precedent for several cases where unwarranted use of power was allowed by courts.

In the case of *Cadila Health Care Limited & Others v. Competition Commission of India & Others*¹² it was held that “During the course of that inquiry, based on that solitary complaint or information, facts leading to pervasive practices that amount to abuse of dominant position on the part of one or more individuals or entities might unfold. At this stage..... Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. Or else, the Excel Crop Care would not have explained the DG's powers in broad terms”.

In the case mentioned above, the DG acted outside the scope of the powers conferred on him by virtue of the Act. This act of the DG was permitted by the DHC following in line with the Apex Court as was held in “Excel Crop” case. This makes it clear that the powers of the DG are neither being guided by the legislature nor by judicial interpretation. This leaves wide scope for the DG to investigate into any matter and add any party according to his discretion regardless of whether or not the prima facie order provides for it.

INTENT OF THE LEGISLATURE BEING RENDERED FUTILE BY SUCH BROAD POWERS

The intent of the legislature behind providing for a mechanism that requires the CCI to scrutinize information or complaints against the alleged violators of the Act is to ensure that there exists enough preliminary material to proceed with investigation against such alleged violators. It is upon such prima facie case decided by the CCI that further investigation into the matter can be done by the DG through its order.

In cases where this particular power of the DG is being widened to accommodate his power to add any “person” or “enterprise” as the investigation proceeds, there is a blatant violation of the mechanism established by law. The requirement of the involvement of the CCI to determine the existence of a prima facie case by examining the information is not being adhered to. The power that is ideally supposed to be exercised by the CCI is being taken over by the DG without any backing by law. This necessarily implies that the procedure established by the Act is being defeated. Additionally, the authority that can be exercised solely by the CCI is getting

¹² *Cadila Health Care Limited & Others v Competition Commission of India & Others*, 2018 252 DLT 647 (DHC).

undermined due to such broadening of powers. Such unclear powers may be misused to harass persons or enterprises by roping them into malafide investigations due to absence of any checks by the CCI.

In the “Cadila” case¹³ that was previously mentioned, the prima facie order by the CCI authorized the DG to include parties other than those specifically mentioned in the order, upon his discretion. This discretion should ideally lie with the CCI as per the procedure laid down by the legislature. The parties that later get included by the DG in the investigation report, Cadila in this case, are compromised of the due procedure they are entitled to by law contrary to the parties that were subjected to due procedure.

Due procedure of law is a fundamental right provided to all persons, including artificial persons, under Article 14 of the Constitution¹⁴. The authoritative body that decides the existence of a prima facie case, which is of utmost importance for commencing investigation, will be varied for different parties in the paradigm where the DG is given such wide powers. Parties are entitled to due application of mind by the CCI, a function that should not be substituted by the DG. This infringes the rights of the disadvantaged parties since the decision to include them is being taken by an authority other than the CCI in addition to them being subjected to a different procedure in comparison to the parties in the prima facie order.

In furtherance to the above, it is a well-established principle that the State cannot further actions that are arbitrary, there is a duty to act fairly and adopt procedure that reflects the same. If the parties involved get subjected to different procedures of commencing investigation, it will be in violation of this right, as stated in the case of *Food Corporation of India v. M/s Kamadhenu Cattle Feed Industries*¹⁵ “The State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fair play in action’”.

This deafening silence in the procedure, which is being upheld by the judiciary, not only infringes their procedural rights but also their fundamental rights.

¹³ Id.

¹⁴ INDIA CONST. art. 14.

¹⁵ Food Corporation of India v. M/s Kamadhenu Cattle Feed Industries, (1993) 1 SCC 71.

RECOMMENDATIONS TO PROVIDE A CHECK ON SUCH POWERS

Procedural modifications that can be implemented

The purpose and object of the Act is to prevent players in the market from entering into agreements or any other such acts that would lead to an “appreciable adverse effect on competition”. Although at the preliminary stage of issuing a prima facie order it might not be possible for the CCI to define the exact scope of the investigation, there must be a reasonable exercise of power by the DG.

The rights of all parties involved can be protected to ensure that everyone involved is being subjected to the same procedure if the mechanism is modified as elaborated further.

To address the anomaly that has been created by the silence of law in regard to the extent to which these powers can be exercised, the process of initiating an investigation against fresh parties can be codified to safeguard their rights. The current procedure ensures that the parties mentioned in the complaint or primary information submitted to the CCI are safeguarded by the involvement of the CCI in commencing investigation. It has previously been established that in the case of fresh parties being added to an investigation, the role of the CCI is being overshadowed by the DG.

To combat this, the legislature may provide for a procedure that mandates the DG to approach the CCI with the findings against such new parties. This will facilitate the CCI to scrutinize such information and pass a fair order as to whether a prima facie case exists against said new parties. This ensures that the purpose of determining a prima facie case is being achieved and innocent persons or enterprises are not being included in unnecessary investigations.

Incorporation of International Doctrines

The development of policies pertaining to competition has been nascent and is still in progress in India. On numerous occasions courts have sought guidance from the judgments of the European Court of Justice which has been the torch bearer of policies regulating competition. The laws and doctrines that are followed in the European union form an inseparable pair that balance the interest of all parties. Hence India, cannot adopt the laws in isolation without inclusion of the doctrines.

The rudimentary “fruits of the Poisonous tree” doctrine safeguards persons from the legal consequences of evidence that is obtained through illegal means. The rationale behind such a

doctrine is to prevent the authorities from benefitting out of abuse of power which protects the rights of the parties. Any evidence that has been obtained by unauthorized means cannot be used against the party in question.

In *Weeks v. United States*¹⁶, where an unauthorized search and seizure operation was conducted by the authorities, the Supreme Court of the United States held the inadmissibility of the evidence so obtained in the following words “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land”.

This doctrine is not merely restricted in its application to the United States, the European courts have also applied the same principle with respect to cases at large including those of competition law.

The ECJ in the case of *Deutsche Bahn and Others v. Commission*¹⁷ held the following “The Court stated in that regard that such a requirement is aimed at preserving, in addition to business secrecy, expressly referred to in Article 28, undertakings’ rights of defense, which Article 20(4) is intended to safeguard. Those rights would be seriously endangered if the Commission were able to rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof”.

Therefore, the inadmissibility of evidence that is obtained without the authorization of law is well established in other countries through the application of this doctrine as opposed to India. Additionally, in the context of the wide powers of the DG to conduct investigation beyond the scope of the order, the evidence obtained in the process forms a part of unlawful evidence. The admission of such evidence by the courts, endangers the rights of the parties.

However, in the paradigm where the process of investigation is checked by the application of this doctrine, the evidence that is procured outside the scope of the order, holds no value in the

¹⁶ *Weeks v. United States*, 232 U.S 383.

¹⁷ *Deutsche Bahn and Others v. Commission*, C-264/16 P, ECLI:EU:C:2018:60 (Germany).

eyes of law. Although the incorporation of such doctrine does not inherently restrict the DG from acting outside the scope of the order, the ill effects of such an exercise can be minimized. This ultimately protects the rights of the parties from bearing the brunt of unlawful exercise of power.

CONCLUSION

In an attempt to establish the authors' prima facie case, emphasis is laid on the preamble of the Act¹⁸ which states "establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets". In light of this, the CCI alongside the DG possess unbridled powers, albeit with bona fide intentions, the execution of this object is being overshadowed by the lack of checks and balances. An Ideal situation is that of one where, the object of such an essential act is fulfilled through a fair investigation process with equal weightage given to the rights of the persons involved.

The Act causes a ripple effect which has led to streamlining of market mechanisms which incentivizes competitors, both internal and international, to operate, take risks and flourish in the Indian market. This in turn facilitates the establishment of a thriving market which is vital for the betterment of the Indian economy. On that account, measures can be taken to create a fair and favorable environment in the market.

¹⁸ *Supra* note at 1.