



Examination of the office of DG Investigation in respect of Competition Law in India

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ABSTRACT

'Investigation' is considered as a key element of enforcement of provisions of any legislation. In India, the Competition Commission of India (herein after referred to as Commission) has been entrusted with the task of enforcing the provisions of the Competition Act, 2002 through its investigative arm- the office of Director General. Thus, Director General has an integral role to play in the enforcement of the provisions of the Competition Act, 2002. In other words, enforcement of the provisions of the Competition Act, 2002 by the Commission is dependent upon the proper functioning of the office of the Director General. No doubt, the Act vests the Director General with the power to assist the Commission in investigating into any contravention of the provisions of this Act. However, there exist various challenges against the nature, scope and jurisdiction of the powers of the Director General. This research paper attempts to examine the challenges raised against the nature, scope and jurisdiction of the powers of the Director General.

INTRODUCTION

Competition Commission of India is an authorised body who is empowered to enforce the Competitions Law 2002 throughout the country. It was the brainchild of the Vajpayee led Government and was endeavoured to realise the philosophy in modern competition laws to eradicate anti-competitive agreements and misuse of dominant positions by the enterprise. The act also works to regulate the acquisition, efforts to acquire control, and the Merger and acquisition attempts for an appreciable adverse effect on the competition in India.

The objective of Competition Act was to exercise control over the practices in competitions which have an adverse effect on the competition in markets of India. The commission also targets the introduction of a healthy measure for promotion and sustenance of the competition and it largely targets to protect the interests of the consumers and give them fair trade practices in their due places.

India adopted its modern competition law with the Competition Act, 2002, replacing the Monopolies and Restrictive Trade Practices Act, 1969, which brought about a more comprehensive and effective competition law in place. However, the intent of the Competition Act, 2002 (as amended in 2007) is distinct from any other regulatory laws of India, since the Act distinctly provides separation of adjudication and investigation powers between two different separate statutory authorities. The first authority is the Competition

Commission of India (the Commission) which is the adjudicatory/regulatory authority and the second is the office of the Director General which is the investigative wing of the Commission.

LITERATURE REVIEW

COMPETITION LAW IN INDIA AND INTERFACE WITH SECTORAL REGULATORS, 1ST EDITION, 2019

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Indian Infrastructure Sectors including Airports, Roadways, Telecom Sector, Electricity Sector, Ports, Special Economic Zones, Natural Gas Sector and so on, had developed a lot in the last 20 years after liberalisation took place considering the developments all across the world.

Due to utility of these infrastructure in the lives of human beings, there had been demand for developments and expansions of the sectors. Both national and international players are involved in the developments of the sectors and the development require regulatory framework. Those frameworks are provided by the laws relating to infrastructure development. There are many sectoral regulators created in India over the last 15 years to look after the developments in the sectors and also prevent anti-competitive activities and entry barriers in those sectors.

The Book has given overview about the major infrastructure sectors in India. The socio-economic situation of the has been examined and the need for proactive role to be played by the regulators had also been mentioned. Also, the concerns raised by the Regulators in related sectors had been discussed, the policies also examined. By reading the Book the students can understand the development issues in the sectors, the laws in place, the policies in existence and the interface of the sectoral regulators.

SECTIONS UNDER COMPETITION LAW, 2002

- **Section 2(g) of the Competition Act, 2002:**

“Director-General” means the Director-General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;

- **Section 16 of the Competitions Act, 2002:**

Section 16(1) of the Competition Act, 2002, relates to the appointment of the Director General for assisting the Commission to conduct any sort of enquiry pertaining to the contravention of any of the provisions of this Act and to perform any other such functions as provided under the Competition Act, 2002.

Section 16 of the Competition Act, 2002 is pertaining to the appointment of the Director General. This can be done by a notification by Central Government for the appointment of a Director General for assisting the Commission to conduct any inquiry for the contravention of any of the provisions as provided in the Competition Act, 2002.

The number of other Additional, Joint, Deputy, and/or Assistant Director General in this manner shall be appointed as prescribed in the Competition Act, 2002. Every Additional, Joint, Deputy, Assistant Directors General shall exercise his power and discharge his functions under the supervisions and control of the Director General and shall work under his direction.

The salary, allowances and other terms and conditions of the services of the Director General and other officers under him shall be as prescribed by the Central Government under the provisions of the Competition Act, 2002.

The Director General and Additional, Joint, Deputy, Assistant Directors shall be appointed from amongst the person of integrity and outstanding ability and who have experience in investigation, knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as prescribed.

- **Section 26 in the Competition Act, 2002:**

Procedure for inquiry on complaints under section 19.—

1. On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.
2. The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
3. Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.
4. The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.
5. If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director-General.
6. If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.
7. If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.
8. If the report of the Director General relates on a reference made under sub-section (1) and such report recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.
9. If the report of the Director General referred to in sub-section (2) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

- **Section 41 in the Competition Act, 2002:**

Director General to investigate contraventions.—

1. The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
2. The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.
3. Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

ROLE OF DIRECTOR GENERAL

The DG's role as the CCI's investigative arm is to support the CCI in looking into any violations of the Act's rules or regulations as well as to provide an investigation report for any cases the CCI refers to. While the CCI is not obligated by the conclusions in the DG's report, it is required that it send the matter to the DG for investigation and request an investigation report if it makes a prima facie opinion that a case of Section 3 or 4 infringement has occurred. The report from the DG may be consulted by the CCI in the event of inquiries into combinations. With permission from the CCI, the DG may, of course, also look into the actions of connected organisations.

The DG is granted the same authority as a civil court has while hearing a case, enabling them to handle such tremendous obligations. Additionally, the DG is empowered to initiate an unannounced raid to perform a "search and seizure." All of these help the DG support the CCI more successfully. Although the DG is supposed to support the CCI, it is the DG's responsibility to conduct the inquiry fairly and impartially and to come to his conclusions in the report. His conclusions must be supported by logic in order to stand up to the referrer's or charged enterprise's counterarguments, as applicable.

To maintain the DG's independence, the CCI is not allowed to direct how an inquiry is conducted. The Central Government is also responsible for the DG's nomination, remuneration package, and the number and type of employees who work in his office. Furthermore, the law expressly states that his compensation cannot be changed laterally to his detriment in order to provide freedom and autonomy in reporting. Once the Directorate has the necessary manpower, it is necessary to train them in the necessary abilities and provide them with cutting-edge equipment so that investigation, prosecution, and regulation can work in harmony.

POWERS AND FUNCTIONS OF DIRECTOR GENERAL

The Director General leads the investigation wing of the Competition Commission of India. Director General in India refers to the Director General appointed under sub-section 1 of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under the section.¹ The Director General, is expected by the Commission, to assist the Commission in investigating into any contravention of the provisions of the Competition Act whenever required or investigate into contravention of any rules or

¹ Section 2(g) of The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

regulations thereunder.² The Director General have all the powers conferred upon the Commission under sub-section (2) of section 36.(3)

Where the CCI upon private complaint or suo motu consider that a prima facie case exists it shall ask the DG to investigate into the matter.³ In respect of investigations whether carried out suo motu or on complained filed by the aggrieved party DG submits investigation report to the CCI within a specific time period. CCI sends the DG Report to both the parties for inviting their comments and objections. After further hearing the CCI passes the appropriate orders.

The success stories of DG and the CCI in the last 5 years can be summarised as follows. In December 2010, CCI investigated the case of cartelisation among traders when onion prices touched 80 rupees. This was done anticipating that the actual cause of the increase of price of onions was secret pact between the traders.⁴ But the investigation was not successful to the extent that the onion traders could be booked.⁵

In June 2012, CCI imposed a fine of 63.07 billion (US\$1.0 billion) 11 cement companies for cartelisation. CCI investigation was successful and the evidence suggested that the cement companies made secret pacts when they met at regular intervals. Their motive was to control market share and hold back supply.⁶ The profits that earned out of the cartelization was designated as illegal profits.⁷

In January 2013, CCI made notable alterations and amendments in agreements between real estate company DLF Limited and apartment buyers.⁸ Some of the important modifications were: The Builder cannot undertake any additional construction beyond the approved building plan given to the buyers. The builder will not have complete ownership of open spaces within the residential project area not sold. Not just the buyer but the builder will be liable for any defaults. All payments made by the buyers must be based on construction milestones and not "on demand". The builder will not have the sole power to form the owner's association. It is not very clear whether the landmark fine in the DLF Case had created deterrence for high rise builders in India, but the landmark fines stand out as one of CCI's greatest success stories in carrying out investigations.

On 8 February 2013, CCI imposed a penalty of 522 million (US\$8.6 million) on the Board of Control for Cricket in India (BCCI) for misusing its dominant position. CCI's investigation revealed that IPL team ownership agreements were unfair and discriminatory, and that the terms of the IPL franchise agreements were heavy in favour of BCCI and franchises had no say in the terms of the contract.⁹ The CCI ordered BCCI to "cease and desist" from any practice in future denying market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities.

In 2014, CCI imposed a fine of Rs. 1 Crore upon Google for failure to abide by the binding directives given by the Director General(DG) seeking information and documents.¹⁰

In August 2014, CCI imposed a fine of around 2,545 crores on 14 auto companies for indulging in anti-competitive trade agreements. CCI in its order has directed these companies to put in place an effective system for purchasing spare parts.¹¹

² Section 41 (1) of The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

³ Section 26 (1) of The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

⁴ <http://www.cci.gov.in/images/media/completed/AO.pdf>

⁵ <http://www.hindustantimes.com/business-news/competition-panel-to-probe-hoarding-onion-price-rigging/article1-1108457.aspx>.

⁶ <http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo29of2010MainOrder.pdf>

⁷ http://articles.economicstimes.indiatimes.com/2012-06-22/news/32368892_1_cement-makers-madras-cements-jk-cement

⁸ Belier Owner's Association versus DLF Limited, Case No. 19 of 2010.

⁹ Shri Surinder Singh Barmi v. Board of Cricket Control for India, Date of Order 8.12.2013,

http://www.cci.gov.in/May2011/OrderOfCommission/612_010

¹⁰ Case No. 7 and 30 of 2012

FACEBOOK INC v. COMPETITION COMMISSION OF INDIA & ANR.

The facts, in brief, leading to the instant Appeals are as under:-

1. Prior to 25.08.2016, WhatsApp (the Appellant in LPA 163/2021), a messaging platform, was governed by its Terms of Service and Privacy Policy of July 2012. In the year 2014, WhatsApp was acquired by Facebook (the Appellant in LPA 164/2021). Facebook Inc. is now known as "Meta Platforms", however, for ease of comprehension, this Court shall refer to the Appellant in LPA 164/2021 by its former nomenclature.
2. On 25.08.2016, the Terms and Services and the Privacy Policy of WhatsApp (hereinafter referred to as "2016 Policy") was updated, and WhatsApp users were informed of Facebook's acquisition of WhatsApp and how Facebook would use WhatsApp's information for its advertisement and products. A one-time opportunity was given to WhatsApp users to opt out of Facebook using their information that was shared over WhatsApp. However, users who joined WhatsApp after the 2016 Policy, were not offered this option.
3. The 2016 Policy, was challenged by way of a writ petition in *Karmanya Singh Sareen & Anr. v. Union of India & Ors.*, W.P.(C) 7663/2016, and the policy was upheld vide Judgement dated 23.09.2016. This Judgment has been challenged before the Hon'ble Supreme Court and adjudication on the same is pending.
4. On 04.01.2021, WhatsApp announced an update to its Terms of Service and Privacy Policy (hereinafter referred to as "2021 Policy"). The 2021 Policy was also challenged before this Court as well as the Hon'ble Supreme Court, and the said matters are still pending.
5. It is stated that cognisance was taken by the Respondent No.1, Competition Commission of India (hereinafter referred to as the "CCI"), of the 2021 Policy, and accordingly vide Order dated 24.03.2021, the CCI initiated a **suo motu** case under Section 26(1) of the Act by directing the Director-General, CCI (DG) to conduct an investigation in order to examine the potential abuse of dominance exercised by both the Appellants under Section 4 of the Act.
6. This Order dated 24.03.2021 under Section 26(1) of the Act was challenged before this Court in W.P.(C) 4378/2021 and W.P.(C) 4407/2021 by the Appellants herein. Vide Judgment dated 22.04.2021, the learned Single Judge held that the CCI- Respondent No.1 in both the Appeals would not be divested of its jurisdiction that it possesses under the Act merely because an issue may be pending before the Supreme Court or the High Court. Furthermore, it was observed that the Order passed under Section 26(1) of the Act is purely administrative in nature and does not entail any consequence on the civil rights of the Appellants herein. Accordingly, the learned Single Judge dismissed the petitions filed by the Appellants herein.
7. Aggrieved by the Judgment dated 22.04.2021, passed by the learned Single Judge in W.P.(C) 4378/2021.

The issue which has been agitated before this Court by both the Appellants is that the CCI has failed to discern a prima facie case that would entail a direction to the DG to investigate the alleged anti-competitive practices.

As regards the barriers to entry, they may arise indirectly as a result of the networks effects enjoyed by the dominant player in the market, i.e. WhatsApp, in the present case. Since networks effects lead to increased switching costs, new players may be disincentivized from entering the market.

¹¹ <http://www.hindustantimes.com/business-news/cci-imposes-rs-2-545-crore-penalty-on-14-car-makers/article1-1256484.aspx>

Thus, in view of the aforementioned factors, the Commission prima facie finds WhatsApp to be dominant in the first relevant market i.e. „market for OTT messaging apps through smartphones in India.

With regard to the submissions on behalf of Facebook India Online Services Pvt. Ltd., this Court does not find any merit on the aspect of imp-leading the said party on account of the fact that the decision of the DG to issue notice to the Applicant, designating it as an "Opposite Party", stems from the information it has secured from Internet Freedom Foundation in Case No. 30 of 2021 regarding its relevance in the investigation. The decision taken by the DG lies in the fact that a thorough investigation can only be conducted if the Applicant cooperates in the same.

Furthermore, it is not contemplated in law that a party should be imp-led at the stage of an appeal when it has not been a party to the matter at the stage when the decision from which the appeal arises has been given, and the remedy of the Applicant only lies by way of a writ against the Order by which it is aggrieved. The contention of Mr. Tripathi that the Applicant has chosen to imp-lead itself in the appeal filed by Facebook cannot be accepted by this Court. The Applicant will have to first make out a prima facie case before the learned Single Judge that there is no allegation against it in the Order of the CCI. The case of the Applicant would involve independent application of mind by the learned Single Judge. The instant appeals are primarily on the issue as to whether the CCI ought to wait till final adjudication of the issues which are pending before the Apex Court. The Implement Application cannot be entertained in the instant appeals which have been filed by Facebook Inc. and WhatsApp. This Court, therefore, does not deem it fit to scuttle the investigation at a nascent stage and defers to the wisdom of the DG and the CCI, and rejects the Implement Application. However, the Applicant is granted the liberty to take all such steps as required by it, in accordance with law, to impugn the CCI Order.

In light of the aforesaid observations, this Court is of the opinion that the impugned Judgement dated 22.04.2021, passed by the learned Single Judge in W.P.(C) 4378/2021 & W.P.(C) 4407/2021, is well reasoned, and that the appeals filed by the Appellants are devoid of merit and substance that would warrant the interference of this Court.

Accordingly, the instant appeals are dismissed, along with pending application(s), if any.

VINOD KUMAR GUPTA v. WHATSAPP INC (2016)

The Competition Commission of India joined an exclusive group of competition law authorities on January 24, 2021, and began taking steps to address privacy and competition law. In accordance with the Competition Act, 2002, the CCI issued a **suo motu** decision directing an investigation into WhatsApp for alleged abuse of dominance in relation to its newly amended privacy policy as of 2021. This was a significant improvement over the earlier case of Vinod Kumar Gupta v. WhatsApp Inc. (2016)., in which the CCI decided not to address privacy issues since they were covered by other laws governing information technology.

In its market assessment of the telecom sector, released on January 22, 2021, CCI recently demonstrated a significant shift in attitude by noting that privacy can take the shape of non-price competition. It was then swiftly put into practise through this **suo motu** investigation order against WhatsApp, wherein CCI acknowledged its departure from the prior ruling in the Vinod Kumar Gupta case, stating that unreasonable data collection and sharing could give dominant players a competitive advantage, potentially leading to abuse of dominance. For the sake of this study, it will be limited to critically analysing CCI's methodology and domain while identifying WhatsApp's ostensibly exploitative behaviour at the intersection of privacy and competition law.

In the present case, CCI passed an order dated 11.03.2014 under Section 26(1) of the Competition Act, 2002 ("the Act") directing the DG to initiate investigation into an alleged abuse of dominant position by JCB. However, JCB filed a writ petition before the DHC against the aforesaid order of the CCI. DHC passed an interim order dated 04.04.2014 on the said writ petition directing that the DG may require JCB to furnish the information called by the DG but, no final order/report shall be passed by the CCI. During the pendency of the writ petition, the DG filed an application before the Chief Metropolitan Magistrate ("CMM") under Section 41(3) of the Act read with Section 240A of the Companies Act, 1956 seeking authorisation to conduct a search in the premises of JCB for recovering incriminating documents and papers related with the case. CMM allowed the application of the DG on 17.09.2014 . Accordingly, an unannounced search operation (popularly known as "dawn raid") was carried out by the DG for the first time in India , on 19 09.2014 in the JCB premises and all incriminating documents, hard drives and laptops found by the inspecting team during the course of the "dawn raid" were seized. Thereupon, an interim application was filed by JCB before the DHC in the pending writ petition for quashing the search and seizure and for return of all documents, hard drives and laptops seized during the course of the search and seizure operation and for a stay on the investigation. The DHC vide its order dated 26.9.2014 stayed further proceedings before the DG.

In the appeal by CCI , the Division Bench of DHC vide order dated 2.12.2014 directed that the parties would be at liberty to raise their contentions before the learned Single judge and left it open to the CCI or, as the case may be, the DG to apply for vacating the order for a stay on the investigation. Pursuant to the above direction, CCI filed an application for vacating the interim order before the learned Single Judge. In the meanwhile , JCB filed another writ petition before the DHC praying for setting aside of the search and seizure. It is in that writ petition that the impugned order dated 2.6.2016 was passed by the learned Single Judge of DHC restraining DG from acting on the seized material for any purpose whatsoever till the next date of hearing. The CCI then filed the present Special Leave Petition (SLP) before the Supreme Court against this interim order of the Single Judge Bench of DHC.

Supreme Court observations

The Supreme Court after hearing both sides observed that the provisions of the Companies Act, 1956 read with Section 41(3) of the Act which enabled the DG to conduct investigation were designed to authorise the DG to conduct both, searches and seizures. It was further observed that unless a seizure was authorised, a mere search would not be sufficient for the purposes of investigation in terms of the Act. Therefore, any interpretation imposing a restraint on seizure where the CMM had already granted a warrant for searches would be inappropriate. Accordingly, Supreme Court vacated the impugned order of injunction and remitted back the pending writ petitions to the DHC to determine whether and if so to what extent a reference to the seized material should be permitted to be made for the purposes of testing the issue of jurisdiction.

CONCLUSION

The Director General shall assist the Commission, when so directed by the Commission, in investigation of any contravention of provisions as set by the Competition Act, 2002 or any of its rules and regulations.

The Director General have all the powers as are conferred upon the Commission under sub section (2) of section 36 of the Act.

Without any prejudice towards the provisions of sub section (2), sections 240 and 240A of the Companies Act, 1956, shall apply to an investigation made by the Director General or any other person investigating under his authority in same manner as they apply to an inspector appointed under the Companies Act 1956.[Relevant provisions of 1956 have been omitted.]

The Competition Act of 2002 was passed by the government as a measure to keep up with the rapidly evolving economic conditions and is consistent with the new economic paradigms of globalisation, privatisation, and liberalisation. It shows the country's readiness to transition from a planned economy to one with a free market but with sufficient checks and controls. Market rivalry that is healthy is crucial for innovation and economic expansion. Injurious trade practices, including the formation of cartels and monopolies, are against public policy, even though the Indian economy has advanced from its protective position regarding domestic sectors.

In addition to emphasising regulation, the Act also adopted the idea of "Competition Advocacy" to advance competition, raise awareness, etc. By imposing severe penalties on the parties involved in anti-competitive acts, the Commission occasionally makes its presence felt in the market. The consumer now benefits from healthy market competition and has the opportunity to choose the most affordable and advantageous choice available to him, which is the main advantage of such acts. Because the general population is now required to accept the ludicrous terms and conditions imposed by the major participants in the market, it hurts not only the little manufacturers but also them. The ideal of economic equity is undermined when the wealthy increase their wealth at the expense of the poor. To monitor such tactics, a body like the Competition Commission of India is necessary.

