

PROCEDURE OF INVESTIGATION BY DIRECTOR GENERAL UNDER THE COMPETITION ACT- BREACH OF PRINCIPLES OF NATURAL JUSTICE

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1. INTRODUCTION

The Competition Act, 2002 (hereinafter referred to as ‘the Act’) was enacted to prevent practices having an adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of the consumers and to ensure the freedom of trade carried on by other participants in the markets in India. The Competition Commission of India (hereinafter referred to as ‘CCI’) was established under the Act which empowers the CCI to investigate cases/complaints that come before it. Therefore, for the purpose of assisting the CCI in conducting enquiries into contraventions of any of the provisions of the Act, the Director General (hereinafter referred to as ‘DG’)¹ was appointed by the Central Government.

The role of the DG assumes significance particularly after the notification of provisions relating to anti-competitive agreements² and abuse of dominance³ under the Act, as the CCI is required to compulsorily refer the matter⁴ to the DG to undertake an investigation, in case the CCI is of the opinion that there exists a *prima-facie* case of violation of the provisions of the Act. Thus, a direction of investigation

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¹ Section 16, The Competition Act, 2002 (includes Additional, Joint, Deputy or Assistant Director General).

² Id, Section 3 (w.e.f. 20/05/2009).

³ Id, Section 4 (w.e.f. 20/05/2009).

⁴ Id, Section 26(1).

by the CCI to the DG is deemed to be the commencement of an enquiry under the Act.⁵

The DG commences the investigation as soon as it receives a *prima-facie* order⁶ passed by the CCI along with a copy of the information or reference as the case may be along with all other documents, materials, affidavits or statements which have been filed either along with the said information or reference or at the time of hearing before the CCI.⁷

The point for consideration here, is whether there is any established procedure for the DG to conduct the investigation as directed by the CCI under the Act and the Competition Commission of India (General) Regulations, 2009 (the Regulations)?

In order to examine the above proposition, the relevant provisions of the Act and the Regulations framed thereunder are to be examined.

The Act devotes a specific Chapter⁸ entitled 'Duties of Director General', which has only one Section⁹ dealing with the powers of the DG to investigate contraventions under the Act as ordered by the CCI. Broadly for the purpose of investigation, the DG has been vested with (i) certain powers of the Civil Courts¹⁰ under the Code of Civil Procedure, 1908 (CPC) and (ii) powers of Inspector relating to production of documents and evidences¹¹ and seizure of documents¹² under the Companies Act, 1956. The Regulations framed under the Act, more or less state the powers of the DG during investigation in taking evidence on record including issuance of commissions for examination of witnesses and documents.¹³ However, the Act also provides that every procedure shall be guided by the principles of natural justice.¹⁴

Now, an attempt is made to ascertain whether the following procedure adopted by the DG in conducting the investigation as per the order of

⁵ Regulation 18(2), Competition Commission of India (General) Regulations, 2009.

⁶ Id.

⁷ Id, Regulation 20(1).

⁸ Chapter V, Duties of Director General, The Competition Act, 2002.

⁹ Supra 1, Section. 41.

¹⁰ Id, Section 36(2).

¹¹ Id, Section. 240.

¹² Id, Section 240A.

¹³ Supra 5, Regulations 41, 42 and 44.

¹⁴ Supra 1, Section 36(1).

the CCI is guided by the principles of natural justice under the scheme of the Act.¹⁵

2. NON- SUPPLYING OF *PRIMA-FACIE* ORDER OF THE CCI AND OTHER DOCUMENTS

In general, experience reflects that the DG as soon as it receives the *prima-facie* order along with other relevant documents as mentioned above¹⁶ from the CCI, issues a notice¹⁷ to the opposite parties (including the Informant/ Third parties) without forwarding a copy of the *prima-facie* order passed by the CCI along with other relevant documents mentioned above.¹⁸ Through the said notice, the DG asks for certain information through interrogatories or for discoveries or production of documents etc. and also intimates the consequences¹⁹ of non-furnishing of requisite information and documents. The Act also provides hefty penalty for providing false/ incorrect information to the DG in response to the said notice of the DG.²⁰

It is seen that when such notices issued by the DG are received by the opposite parties, they are unaware of the fact that some investigation is going on against them under the Act for violation of any of the provisions of the Act for which the CCI, for such violation can *inter-alia* impose a hefty penalty up to 10% of the average turnover for the last three preceding financial years.²¹ Therefore, such opposite parties in good faith furnish the requisite information/ documents as sought by the DG, without taking the defence available to them at this stage under the scheme of the Act²² and thus, become a law abiding corporate. However, in some cases where the opposite party (or parties) has (have) any suspicion when they receive the notice u/s 41 of the Act from the DG that there may be some investigation going on for violation of the provision of the Act, they request the DG to supply them a copy of the order passed by the CCI on the basis of which the DG has issued the

¹⁵ Ibid.

¹⁶ Regulation 18(2), Competition Commission of India (General) Regulations, 2009.

¹⁷ Id, Section 41(2) r.w. Section. 36(2).

¹⁸ Supra 5.

¹⁹ Supra 1, Section.43.

²⁰ Id, Section 45.

²¹ Id, Section 27(b).

²² Id, Section.19(3) & Section 19 (4).

notice to them. Even in such cases, the DG instead of supplying a copy of the *prima-facie* order of the CCI and other relevant documents,²³ informs the opposite party that they may approach the CCI in this regard.²⁴

3. NON-SUPPLYING OF ADDITIONAL INFORMATION DURING INVESTIGATION

As stated above, the DG also issues notices²⁵ to the informant and/or the third Parties during investigation for collecting further documents/evidence etc. Pursuant thereto, the informant and/or the third parties furnish their reply to the said notices. However, it is seen that the DG almost on no occasion supplies the copies of additional information collected during investigation from the informant and/or third parties to the opposite parties against whom it is using the said additional information in its Investigation Report.

4. RECORDING OF EVIDENCE ON OATH OF INFORMANT/THIRD PARTY IN THE ABSENCE OF OPPOSITE PARTY

During investigation, the DG is competent to call parties to lead evidence by way of affidavit or oral evidence in the matter.²⁶ In accordance with the provisions of the Act, the oral evidence may be recorded on oath.²⁷ It is seen that during investigation, the DG almost on no occasion, informs the opposite parties against whom the investigation is being conducted, as regards his calls for the informant and/or third party to lead evidence either orally or by way of affidavit. Thus, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the

²³ Supra 5.

²⁴ There is one exception to the above stated position which is that in case the Informant while filing the Information Petition (Section 19(1)) before the CCI also moved an Application for interim orders (Section 33) then in such situations, the CCI before passing any interim order forwards the Information Petition along with the documents with a *prima-facie* order (Section 26(1)) passed by it to the opposite parties for their reply and comments.

²⁵ Supra 17.

²⁶ Supra 5, Regulation 41(4).

²⁷ Supra 1, Section. 36(2)(a).

opposite party. In fact, whenever the DG is calling the informant and/or third party for leading evidence, he is duty bound to inform the opposite party.

5. NO OPPORTUNITY BY THE DG FOR CROSS EXAMINATION OF THE INFORMANT/THIRD PARTY TO THE OPPOSITE PARTY AGAINST WHOM THE INVESTIGATION IS BEING CARRIED OUT

As noted above, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the opposite party. Therefore, at least thereafter, the DG should give a copy of the evidence so recorded of the informant/third party during investigation to the opposite party for giving him an opportunity for cross examination of the said informant and/or third party, in terms of the regulations.²⁸ It is seen that in practice, no such opportunity for cross examination of the informant and/or third party is given.

6. INEVITABLY—NO EVIDENCE LED IN REBUTTAL BY THE OPPOSITE PARTY DURING INVESTIGATION

As stated above, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the opposite party and no opportunity for cross examination of informant and/or third party is given to the opposite party by the DG, therefore, the opposite party by the DG is handicapped in producing any evidence in rebuttal during investigation. Thereafter, the Investigation Report is prepared by the DG without any rebuttal of the opposite parties to the evidence.

From the aforesaid, it is abundantly clear that not only the procedure adopted by the DG in conducting the investigation as per the order of the CCI is in gross violation of the principles of natural justice at various stages of investigation, but also the procedure given in the Regulations framed under the Act is not being followed rigorously by the DG during investigation as per the order of the CCI which also leads to the gross violation of the principles of Natural Justice.

²⁸ Supra 5, Regulation 41(5).

As a result, the Investigation Report submitted by the DG to the CCI pursuant to their *prima-facie* order is not reflective of the correct conclusions/findings as the procedure adopted by the DG gives rise to reasonable suspicion of business as it is one sided. In *stricto sensu*, the Investigation Report submitted by the DG is not a valid document in the eyes of law as it is in gross violation of the principles of natural justice and may not be relied upon by the CCI.

It is seen that in the regulations framed under the Act with respect to various topics such as “Power and Functions of the Secretary,” “Procedure for Scrutiny of Information” etc., a set procedure has been laid down exhaustively. Therefore, it is suggested likewise, the CCI may incorporate the “set procedure for conducting investigation by the DG” by appropriately amending the regulations as the provisions of the Act and the Regulations framed thereunder are in vogue for more than five years (5 years).