

# Section B

## Articles

### Post - DG Investigation Inquiry by CCI

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*The Competition (Amendment ) Bill, 2012, Bill No. 136 of 2012 ( the Amendment Bill 2012) lapsed before it could become a law because of the dissolution of the then lower house of Parliament just before the general elections leading to the present Government, at the centre, came to power. One of the amendments, proposed in this Amendment Bill 2012, sought to make changes in Section 26 of the Act to allow some clear lee way to the Competition Commission of India (Commission) to differ from the report of the Director General(DG) and close the matter despite the DG having come to the conclusion that there is a violation of competition law after he has investigated into the allegations of violations of competition law. Such clarity, sought to be introduced by the Amendment Bill, 2012, is missing in the relevant provisions of the Act as they stand today. In the appropriate provisions, as they exist today, there is enough room for inquiry by the Commission in addition to the investigation by the Director General(DG) after investigation by DG is done. The natural corollary is that a poorly investigated report by DG can not be either a basis or excuse for not upholding violations of competition law if found in a prima facie opinion of the Commission. However, it is a moot point if this part of the mandate is being fully exercised at present or not.*

*It is this part of inquiry by the Commission after the report has been submitted by the DG which the author, who headed the Antitrust Division of CCI to actually see the implementation of functional regulations in real practice and also assisted the Commission in drafting these regulations, discusses in this article.*

On May 20<sup>th</sup>, 2009, the antitrust competition law enforcement completed seven years of existence in India. This is a good enough time for us to look back and take stock of the ground reality as to how has the competition law

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enforcement fared in India. This may be a good time for an introspection as to whether the trends being followed in enforcement of competition law by the Competition Commission of India ("the Commission" or "CCI") has any scope for improvement or the enforcement has reached a level of maturity.

A quick and cursory look at Section 26 of the Competition Act, 2002( the Act) would show that after having recommended an investigation under Section 26(1) of the Act and got the report of investigation into the matter from the Director General(DG), the Commission has to sit on judgement on the investigation report submitted to it by the Director General (DG) appointed under Section 16 of the Act. The DG has its mandate for investigation under Section 41 of the Act. The mandate of investigation to DG under Section 41 of the Act is extremely wide as, if not directly albeit indirectly, it does also have complete provisions related to search and seizure.

As is widely well known, search and seizure provisions under different statutes are provisions which are quite severe in nature in as much as they

impinge upon the privacy of the individual citizens of the country by way of giving the authority to different enforcement agencies to enter the office and residential premises of different executives of enterprises believed to be violating the provisions on the relevant provisions of law for reasons of collecting evidence. These are the provisions which all civil societies have to carefully evaluate. Such powers are intended to be given only to those departments/ law enforcement agencies where the balance of convenience certainly tilts towards enforcement of law rather than the protection of individual privacy involved in such matters. Such provisions have been given in law relating to narcotics, money laundering, criminal activities etc. and also has been given to departments which are not necessarily enforcing criminal mandate such as Income Tax Department etc. but where the society, through its law makers, have taken a call as to whether the introduction of such provisions outweigh the harm caused by the intrusion into privacy of the citizens.

The DG, appointed to remain under the overall supervision of the CCI, does have a wide and sweeping mandate to enable him to prepare and submit an investigation report to the Commission to enable it to reach a considered and judicious outcome with regards to any anti competitive conduct alleged by any information provider and/or denied by the opposite parties as the case may be.

However, once the DG has been entrusted with the task of submitting an investigation report into the matter DG, the CCI is neither responsible nor interfering in day to day functioning of the office of the DG as far as the investigation work leading to the finalisation of the report is concerned. The DG can reach a conclusion that the violation is really serious enough and submit a report to the Commission recommending action for the allegations of violation of competition law. In case

the investigation done by the DG does not reach a conclusion by which any violation is proved, the DG may submit, in his report, that no violations of competition law have taken place. Thus, the Commission would have an opportunity to either agree or disagree with the report submitted by DG on any matter referred to it by the Commission within the scope of the provisions of Section 26 of the Act and not beyond. Section 26 of the Act is extremely significant to the discussion of issue at hand and its subsections shall be referred to in the discussion which follows. Therefore, it shall be in fitness of things, if we extract this section below for a ready reference. This is being done below:

*"26. Procedure for inquiry under Section 19:*

*(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received 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: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.*

*(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.*

*(3) 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.*

*(4) The Commission may forward a copy of the report referred to in sub-section (3) to the parties concerned: Provided that in case the investigation is caused to be made based on a reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) 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 referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.*

*(6) if, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.*

*(7) if, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.*

*(8) If the report of the Director General referred to in sub-section (3) 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."*

To have a full perspective, let us have a look at the amendments proposed to the above Section 26 in the Amendment Bill, 2012. Clause 11 of the Amendment Bill dealt with these changes. This is being reproduced below:

- “11. In Section 26 of the principal Act,—*
- (a) in sub-section (7), after the words “in accordance with the provisions of this Act”, the words “and make appropriate orders thereon after hearing the concerned parties” shall be inserted;*
- (b) in sub-section (8), after the words “in accordance with the provisions of this Act”, the words “and make appropriate orders thereon after hearing the concerned parties” shall be inserted.”*

If these were amendments were to come through, the two subsections i.e. subsections (8) and (9) of Section 26 of the Act would have read as under:

- (7) if, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act and make appropriate orders thereon after hearing the concerned parties.*
- (8) If the report of the Director General referred to in sub-section (3) 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 and make appropriate orders thereon after hearing the concerned parties.”.*

Different sub sections of Section 26 of the Act do deal with instances where the Commission agrees or disagrees with the finding of the DG. However, what is significant is this that the all possible outcomes have been given in different

subsections of Section 26 of the Act and, in my opinion, nothing more can be inferred except what has been given in the section. As an example, where there is no case is made out on the basis of the report of DG, an order under Section 26(6) of the Act would be passed by the Commission closing the matter. In another instance, the DG may reach the conclusion that a violation of competition law, as alleged, is indeed made out and that is also concurred with by the Commission. In those situations ‘If the report of the Director General referred to in sub-section (3) 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’.

From the above scheme of the Act, it is seen that in subsection (8) of Section 26 of the Act also, the imposition of penalty on the party(s), despite recommendation of DG that there is contravention of any of the provisions of the Act, the imposition of penalty is not automatic and the only recourse before the Commission. This is merely indication enough that the violations have been inferred by the DG. Even after this, the Act casts upon the Commission the responsibility of inquiry. Rightly speaking, the Commission can only impose penalty after further inquiry. Any imposition of penalty, on parties alleged against, without inquiry by the Commission shall be on a weak footing and can be legally challenged.

Going by the cases decided by the Commission, it can not be stated with certainty that this drill is being always followed by the Commission in all the orders passed while imposing penalty. The Commission has a wide sweep as far as the first *prima facie* view, after receipt of information and its consideration before the Commission, as to whether it calls for an investigation from DG or not is concerned. In any case,

a *prima facie* opinion only implies an opinion without following any procedure and without being supported by any in depth investigation. That is no more the case once a report of DG is received. However, once the report from the DG comes before Hon'ble Commission, strictly speaking in the law as it exists today, it does not have such a wide lee way in the options before it as it had prior to forming a *prima facie* opinion about there being some merit in the case or not. After, the DG has submitted a report under sub-section (3) of Section 26 of the Act, the scope of action before the Commission is not as wide as it was before the matter was referred to the DG for investigation.

When the Commission took a view as to whether there existed a *prima facie* case or not, the Commission, so long as it passed a reasoned order, in terms of the finding of Hon'ble Supreme Court in SAIL judgement, is free to take a decision as whether to direct DG to cause an investigation into the matter. The situation dramatically changes, once an in-depth investigation leaves much to be desired. Not that such reports can be wished away altogether but, if such a report is received, the Commission has to move beyond such a report rather than stopping at the report and closing the case. The DG can be directed to do fresh or additional investigations or the Commission can do its own inquiry.

As detailed in Section 26 of the Act above, the report of DG changes the perspective completely. After having vested so much of investigation powers with the DG and the Commission having considerable authority to issue commissions and engaging experts' from various fields, there is really no room for the Commission to shield itself behind an investigation report if the report leaves much to be desired.

In cases other than those originating from a reference received from the Central

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Government or the State Government or the statutory authority, the Commission further has full freedom to either share a copy of the investigation report with the parties concerned or not as, in terms of the language of the statute the Commission 'may forward a copy of the report referred to in sub-section (3) to the parties concerned: Provided that in case the investigation is caused to be made based on a reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be'. There are various possibilities after the report from DG is received. DG may either recommend that there is no contravention of the Act or that there is contravention of the provisions of the Act after the completion of the investigation.

If, in terms of the provisions of Section 26(5) of the Act, the DG gives a recommendation that there is no contravention of the provisions of the Act, the Commission is obliged to invite objections or suggestions from either the Central Government or State Governments or the Statutory Authority



or the parties concerned as the case may be on such a report of the DG. Therefore, in the event of DG not finding any contravention of the provisions of the Act, the Commission is duty bound to invite objections and suggestions from all these agencies. After all these objections and suggestions are considered by the Commission, there are various possibilities. The Commission may be satisfied with the quality of the investigation and its outcome or it may not be satisfied for any reason whatsoever. Further, depending on its wisdom, if not satisfied with either the methodology or the outcome of DG Report, it may form any of the following opinions:

*(a) DG has understood the proposition but failed to deliver on the report in terms of the expected quality (not outcome) level of the report but the Commission still feels that the DG can improvise report after further investigation; or*

*(b) DG has totally misdirected himself and it would really serve no purpose to direct him to cause further investigation and the ends of justice would be better served by causing a further enquiry in the matter. This enquiry need not be done by DG because if that was possible, the Commission could have achieved that objective by directing further investigation by DG. The very fact that that option is considered not viable, the Commission had to opt for the option of enquiry by some other person/agency other than DG. Who that person / agency would be had been left totally open and is in keeping with the huge powers given to the Commission in terms of engaging all type of experts. To assist it in discharge of its obligations; or*

*(c) Neither further investigation nor enquiry by any other person/agency would serve the purpose.*

What will be the three corresponding courses of options available before the Commission in the three possible opinions being formed by the

Commission as listed above. In the opinion of the author, there are being given hereunder :

*1. In the first option, the Commission, still believing that the DG with slight more diligence can produce a better report by marshalling appropriate and enough evidences and analysing them, may direct the DG to cause further investigation; or*

*2. In the second option, foreclosing the option 1 of further investigation by DG, the Commission may decide to 'cause further enquiry to be made in the matter'. This enquiry need not be done by DG because, if that was possible, the Commission could have achieved that objective by directing further investigation by DG which was option 1.*

*The fact that that option was considered not viable only made the Commission to opt for this option of enquiry by some other person/agency other than DG. Who that person / agency would be had been left totally open to the good judgement of the Commission and is in keeping with the huge powers given to the Commission in terms of engaging all type of experts to assist it in discharge of its obligations; or*

*3. Following the third option, if the Commission reaches a conclusion that neither further investigation by DG nor any enquiry by any other person/agency would serve the purpose, the Commission itself has to take the mantle on enquiry on its shoulders. There is an old proverb 'buck stops at the top'. This last situation is such a situation where the buck really stops at the top, in terms of the provisions of Section 26(7) of the Act, and the Commission may 'itself proceed with further enquiry in the matter in accordance with the provisions of this Act'.*

In the three possible opinions of the Commission and the corresponding options available before it, there is a 'one to one' mapping and mixing is really neither intended by the statute nor is possible if the Act were to be implemented in its letter and spirit.

As is well known, in the scheme of things under the Act, the DG is heading the investigation division of the Commission and therefore, logically speaking, the entire responsibility of 'directing' investigation lies with the Commission. The responsibility of DG is to 'cause' an investigation under the supervision of the Commission. However as it is the Commission which 'directs' DG to investigate and also has powers to 'cause further inquiry' and also 'itself proceed with further inquiry', it is the Commission which is the 'owner' of 'directing' investigation and appropriately utilising the outcome if such an investigation and, if needed, 'cause further inquiry' or even 'itself proceed with further inquiry'. A clarity of 'ownership' of the outcome of investigation is extremely important for the scheme of the Act to be implemented properly. As no board of a company can take a shield be find the incompetence of any of its executives, the Commission also can not decide not to impose penalty just because the report of DG leaves much to be desired and does not marshal evidence or, after marshalling it does not do a proper in depth analysis.

Who are the people to cause this 'further inquiry' or assist the Commission to 'itself proceed with further inquiry'? Perhaps this could be some other Officer or Division or Expert which can examine the entire issue, do further inquiry, if needed, and come up with a meaningful outcome. As the third option given in Section 26 (7) of the Act is the option of the Commission proceeding itself with the enquiry, therefore this inquiry eludes to this being done by a third party other than DG or the Commission. So having seen in this prospective, there are three

options, as detailed above, before the Commission after receipt the investigation report from the DG.

Implication of this architecture appears to be that the Commission has to exercise its freedom at the first filter point well i.e. deciding on whether an investigation has to be ordered into a particular matter or not. Here the Commission as huge sweep of powers and except that, in terms of judgement of Hon'ble Supreme Court in *SAIL* case, it should pass a speaking order, there are no other fetters on the Commission at this point of time.

However, this kind of freedom stands substantially curtailed when we see strictly at the provisions of the Section 26(4)(5)(6)(7)(8) of the Act. Now, if the DG reports that there is some contravention of the act in the terms of Section 26 (8) of the Act, the Commission has to work towards strengthening the DG investigation by its own 'inquiry' either by itself or through others. On the face of it, is has no discretion to blame the DG for investigation and proceed to close the matter but is expected to pass an order and impose a penalty after strengthening the 'not so well done' investigation by DG. This situation although may appear weird but indeed is true in terms of present wording of the Act sans the intended amendments having become law. The Commission being the higher authority, perhaps, cannot be excepted to just close its eyes to some reports which are not really up to the mark and which needs course correction. This really calls for an introspection, especially, in view of the fact that, sometimes, the quality of investigation is seen to have become a basis for not imposing penalty on contravening parties in the end.

