

Regulation 46A of the Competition Regulation 2009: A Hobson's Choice or a Balancer of Rights

- Yash Tandon

Abstract

The newly inserted regulation 46A of the Competition Commission of India (General) Amendment Regulations, 2018 is been regarded as a welcome step in ensuring the right of a person appearing before the Director General, by giving an opportunity to the person to come up with an advocate with certain limitations imposed. The foundation of this amendment is based upon the Delhi High Court judgement in the matter comprising between CCI v. Oriental Rubber Industries¹ where Court held that the DG is a person “legally authorised to take evidence” hence come under the purview of Section 30 of the Advocates Act, 1961. However the aforesaid amendment although a positive step sparks certain questions because of its restrictions imposed that whether the amendment is actually acting as a balancer between the rights of the DG and the person appearing or providing a hobson's choice to the person during investigation.

The article will also compare the powers of CCI, DG with Securities Exchange Board of India (SEBI), and with United Kingdom's Competition Act, 1998 while scrutinising the present amendment.

¹ Oriental Rubber Industries Private Limited v Competition Commission of India & Anr 2016 SCC OnLine Del 2438 : (2016) 133 CLA (SN) 1 (India).

Introduction

India's fair trade regulator, the CCI has given numberless orders which have been challenged through various Courts and the appellate tribunal, the COMPAT (now NCLAT with the new amendment) on issues pertaining to abuse of powers by the DG or issues where the decision rendered by CCI was not in accordance to principle of natural justice which has to be followed under section 36(1) of the Competition Act, 2002, "*in discharge of its functions, the Competition Commission of India ("CCI") should be guided by the principles of natural justice*".² The complaints were also related to the matters where DG did not allow to cross examine the witness whose statement is relied upon which is also a regulation under Competition General Regulation, 2009, Regulation 41(5) which enumerate that- "*If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, **as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.***" It can be inferred by reading down the provisions in its literal sense that the final say still rests with the Commission, as the provisions are mere directory in nature and not mandatory.

In order to carry out the purpose of the Act the DG and CCI have been conferred with sweeping powers, hence such aforementioned appeals are being filed, resulting in the delay of the investigation procedure by the investigating authorities, which is again a hindrance as contended by CCI towards the objective of the Act,³ because if the parties investigated can rush to courts and stall investigations against them, then the object of the law to proactively curtail anti-competitive behaviour is made ineffective and CCI is rendered toothless"⁴, however this is a separate issue which is not the subject matter of this article. There are instances where the DG

² Coal India Limited and Ors. v. CCI, and others, Appeal No. 01, 44-47, 49, 70/2014 and 52/2015 dated 17-05-2016.

³ CCI v. SAIL, (2010) 10 S.C.C. 744 (India).

⁴ John K. Ashton & Andrew D. Pressey, *Regulatory Perceptions of Marketing: Interpreting U.K. Competition Authority Investigations from 1950 to 2005*, 27 J. PUBLIC POLICY MARK, 156-164 (2008).

has overstepped some powers conferred, for instance in Himachal Pradesh Society of Chemist & Druggist Alliance and Others.v. Rohit Medical Store and Ors.,⁵ and in Forech India Ltd. v. CCI,⁶ the DG relied upon statements which were bound to have conflicting interest and did not authorise the other party the right to cross examine the witness, COMPAT criticised CCI and held that such reliance upon witnesses who have conflicting interest in the pertaining case and not allowing the party to cross examine does not serve the purpose and hence dangerous, although it is discretionary power of the authorities to afford such an opportunity,⁷ thus again having sweeping powers to the concerned authorities.

Therefore there was a need to balance between the rights of the person and the DG, however because of such sweeping powers there were many instances where CCI actually curbed down various anti-competitiveness⁸ and helped Indian economy to prosper, but as mentioned aforesaid there are cases where the rights of person are encroached to a larger extent by DG during investigation creating an imbalance.

Importance of Investigating Procedure conducted by DG

In order to carry out the investigation, firstly the CCI can institute an inquiry either suo moto or through reference from State Authority, while upon the issue relating to anti-competitiveness or abuse of dominance the CCI is mandated to refer the matter to DG to carry out the investigation and report to the commission. Therefore the investigation carried out by DG is very crucial and important aspects arise out of such investigation that whether the CCI, on receiving any information regarding violation of any provisions of the Act, should make an opinion regarding existence of a prima facie case without giving the opposite party an opportunity to rebut the

⁵ Himachal Pradesh Society of Chemist & Druggist Alliance and Others.v. Rohit Medical Store and Ors. 2016 SCC OnLine Comp AT 413 (India).

⁶ Forech India Ltd. v. CCI 2016 SCC OnLine Del 5379 (India).

⁷ Alleged cartelisation by Cement Manufacturers v. Shree Cement Limited and Others 2016 SCC OnLine CCI 54 (India).

⁸ Shamsher Kataria v. Honda Siel Cars Ltd. & Ors 2014 SCC OnLine CCI 95 : [2014] CCI 26 (India).

allegations against them, and whether the DG, while investigating the case, should rely on evidences against the respondent without giving him an opportunity to rebut such evidences. With such questions arising there are instances where the prima facie opinion was formed, but in the end the evidences which were relied either were having conflicting interests as mentioned above in the case of Forech India Ltd. v. CCI or the evidences relied upon were false, affecting the credibility of the company.

Hence, the importance of carrying the investigation is very crucial, thus giving the DG, powers similar to the nature of a civil court under the Code of Civil Procedure, 1908 namely, a) summoning and enforcing the attendance of any person and examining him oath; (b) requiring the discovery and ;(c) receiving evidence on affidavits; (d) issuing commissions for the examination of documents etc. However the DG is not bound by the technicalities the civil courts follow⁹.

Despite the explicit mandate mentioned under the Act and the Regulations, DG's office and the CCI cross the boundaries of law in order to curb the anti-competitive practice, one such example of such non-adherence is the Oriental Rubber Industries Case¹⁰ where the right to inspection of the records was denied, though repeated requests were made by the respondents under Regulation 50 where one can be allowed to inspect the documents, which resulted in filing of a writ petition under the Hon'ble High Court of Delhi seeking permission to inspect upon the materials that had been relied by the authority, **and furthermore to allow the respondents to be accompanied by legal counsel when given their statements.**

The High Court granted such permission to the respondents and stated that under Section 30(ii) of the Advocates Act, 1961 an advocate has the right to practice before any tribunal or **person legally authorised to take evidence** and as mentioned above that DG has similar powers to

⁹ Section 36(2) of the Competition Act, 2002.

¹⁰ Supra note 1.

that of civil courts and is legally authorised to take evidence and the procedure adapted by DG to take evidence is so crucial that it cannot be said that it is mere an enquiry and not the commencement of trial. Furthermore the court held that there is no express bar upon the advocates to appear in the Competition Act, 2002 unlike the Industrial Disputes Act, 1947 or Family Courts Act, thus enabling the right of the person to accompany with an advocate during the deposition. The Court stipulated that because of such sweeping powers conferred upon the DG, one such power is that the DG can record evidence **under oath** unlike the Police which has no such power, DG's procedure of investigation amounts to commencement of trial. On the contention that the person called upon deposition is **not an accused thus there is no such point of self incrimination**. The court rightfully countered that although the person is not an accused, but the credibility and competitive position of the public company is affected, hence allowing the advocate to accompany the person.¹¹

This landmark case laid down the foundation of amendment under Competition and Regulation 2009, adding Regulation 46A, creating the balance between the DG and the rights of the person called. The amendment is applauded with much appreciation; however the restrictions that comes forth along with the raises certain questions which needs to look upon.

Decoding Regulation 46A of the Competition General Regulations 2008

Regulation 46A (1)(a) stipulates that the Commission may allow the advocates to accompany the person only if in writing and proper Vakaltanama or Power of Attorney is given to the DG. As CCI is a commission adjudicating upon anti-competitive matters, the question that Vakalatnama can only be filed before a court of law or tribunal and the chairman of CCI is not a judicial member, thus this provision violates the very nature of the objective of Vakalatnama, cannot be

¹¹G R Bhatia, *India: Court Allows Presence Of Advocate During Recording Of Statement By Director General, Competition Commission Of India*, MONDAQ, (23 June 2016), <http://www.mondaq.com/india/x/502794/Antitrust+Competition/Court+Allows+Presence+of+Advocate+During+Recording+of+Statement+By+Director+General+Competition+Commission+of+India> .

said to be in proper context because section 35 (d) of the Competition Act, 2002 which specifically states that- “A complainant or defendant or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries, or cost accountants or **legal practitioners** or any of his or its officers to present his or its case before the Commission. For the purposes of this section, “legal practitioner” means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.” Thus an advocate can appear on behalf of the complainant and if it is permissible then the concept of Vakalatnama is actually important because Vakalatnama is a document where the advocate has been empowered by his/her client to represent him/her in the case. If the vakalatnama is not being allowed then there can be cases where the client did not give consent to such advocate and the entire proceedings should be declared null and void.

Regulation 46A (1)(b) and (c) stipulates that an advocate can neither sit in front of the person so summoned, nor be at a hearing distance of such person. Moreover the advocate is also barred from interacting, consulting, conferring or in any manner communicating with the person, during his examination on oath. Such restrictions raise important questions because the purpose of adding such amendment is to safeguard the rights of the person and create a balance between CCI and the person called upon investigation. If a question is being asked during deposition which if answered would denounce the credibility of the company or if it is some private information remotely related or totally unrelated to the pertaining matter, then if the advocate would have been allowed to sit even at a hearing distance then he/she can restrict that person not to disclose such private information.

However such restrictions is kept keeping in mind the essence of the Act because if the advocate is allowed to interfere during deposition then certain key discussions which might be effective to find the nature of any anti-competitive provision if any, would be stopped by the accompanying advocate, thus making it very difficult for the DG to ascertain the circumstances and come to a

conclusion. Moreover the information procured by the DG when submitted to the Commission, the commission if through the information does not feel that any prima facie case appears would set aside, and no case would be instituted.¹²

Furthermore, sub clause (2) of the new Regulation provides that the CCI may debar advocates from appearing before the Commission, on a complaint by the DG for **misconduct**. Now the question arises what is the definition of misconduct with respect this provision? The Advocates Act, 1961 stipulates certain procedures while punishing the advocate for misconduct, however in the Regulation 46A (2) the Competition Commission can debar the advocate based upon the information received by the DG upon such misconduct, moreover the commission can discontinue the presence of the advocate in future proceedings **till the commission deems necessary**.

Senior Counsel and Bar Council Member S Prabhakaran has commented that the new Regulation appeared to introduce a form of untouchability *“It is very unfortunate that these executives are sitting in their ivory towers and passing these kinds of regulations.”*¹³

This raises certain questions regarding the powers of the Commission with such authority where it can debar the advocate for misconduct. In *Anant Brahmachari vs UOI & Ors*¹⁴, the Delhi High Court held that the advocate presence must be allowed during investigation of an individual, the objective behind such allowance is to curb down intimidating situations where the investigating authority tries to threaten or coerce the person. The verbatim words are- *“a lawyer cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried”*. Thus is the objective of the CCI

¹² Section 27(2) of the Competition Act, 2002.

¹³ Meera Emmanuel, *Madras HC stays CCI Regulation restricting Advocates' interaction with clients during DG probe*, BAR & BENCH, (January 5 2019), <https://barandbench.com/madras-hc-stays-cci-regulation/> .

¹⁴ *Anant Brahmachari v. UOI*, 2012 S.C.C OnLine Del 1680 : ILR (2012) 3 Del 682 (Del) (India).

too because if the advocates try to whisper the answers to the person, then they would interfere in the matter of investigation carried upon and would defeat the purpose of the Act.

CCI and SEBI: Comparative Study of the powers of Investigating Authority

Securities Exchange Board of India also stands at a similar footing with Competition Commission of India, as the Board also investigates upon matters relating to unfair trade practices. If the Board has reasonable ground to believe that—

(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or

(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board there under, the board may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.¹⁵

The powers of the Investigating Authority like DG in case of CCI are enshrined under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003¹⁶ stipulating that the investigating authority shall have the power to call for information or records from any person¹⁷, to inspect any books or register where the investigating authority has reasonable grounds that such company has been conducting in violation of the provisions mentioned under the Act¹⁸ and other such powers mentioned like to examine any person **under oath, and may administer accordingly and for that purpose may require any of those**

¹⁵ Section 11C of the Securities Exchange Board of India, 1992.

¹⁶ Regulation 6 of the SEBI Regulations, 2003.

¹⁷ Regulation 6(1) of the SEBI Regulations, 2003.

¹⁸ Regulation 6(2) of the SEBI Regulations, 2003.

persons to appear before him person. It is vividly clear that the powers of the Investigating authority under SEBI and that of DG under CCI is of similar nature and require similar powers to furnish the objective of their Acts respectively. Regulation 8 stipulates that there is a duty of the person called upon to co-operate and to answer any question which is put forth to the person concerned in pursuance of the powers of the Investigating Authority.¹⁹

However the amendment brought forward in CCI Regulations can set an example to the SEBI, because no such provision exist to the person called upon during deposition, thus rendering this judgement a welcome step towards balancing the right between the investigating authority and the person concerned. On the other hand SEBI's investigative powers have been broadened manifold. SEBI's power to call for information is now not limited to banks / corporations / other authorities and to that extent SEBI can ask any person to provide information in regard to any transaction under inquiry. Further, SEBI's power of investigation is now independent from any initial judicial check. Against the previous requirement of making prior application to the Judicial Magistrate in cases where investigation was deemed necessary, it is the Chairman of SEBI who now has the power to authorize the investigating authority to undertake the necessary action, thereby doing away with the initial judicial scrutiny.²⁰ There were certain instances where SEBI through investigating authority faced legal challenges while probing over privy issues relating to such investigations. The regulations stating that the investigating authority can procure any books, registers, etc which they believe have certain relation towards unfair trade practices, tend to demand private communications as well from the concerned person.²¹

With such broadened powers of SEBI, and keeping in mind this particular amendment in CCI Regulations, a positive step may also be put forth in the SEBI Regulations of Unfair Trade

¹⁹ Regulation 8(1) (b) of the SEBI Regulations, 2003.

²⁰ <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/sebi-commands-increased-authority.html>? no_cache=1&cHash=54d9ee716e97b1080c54bca3ad6cdcb.

²¹ Abhirup Roy & Rafael Nam, *SEBI faces legal challenge in probe over prescient messages*, REUTERS (DECEMBER 30, 2017, 10:46 PM) <https://in.reuters.com/article/india-whatsapp-sebi-probe/sebi-faces-legal-challenge-in-probe-over-prescient-messages-idINKBN1EO0FC>

Practices, to consider the rights of the person involved and create a balance. Thus such amendment is a welcome step by Competition Commission of India to ascertain the rights of the person called for deposition and maintain the credibility of the company of that person in the eyes of public.

Comparison with Foreign Jurisdiction: UK Competition Law Investigating Procedure

The Indian Competition Law is structured largely on the European Union model keeping in mind the UK model as well. In UK, the Competition Market Authority (CMA) is the body to which complaints are being filed for any anti-competitive practices. On receiving complaints the CMA decides which case to investigate based on **prioritisation principles** which are- (a) Impact; (b) Strategic Significance; (c) Risks and (d) Resources.²² When the CMA prioritise the complaint based on such aforementioned principles the case will be allocated to a designated case team, responsible for day-to-day running of the case, and a Senior Responsible Officer (SRO), who is responsible for authorising the opening of a formal investigation and taking certain other decisions, including, where the SRO considers there is sufficient evidence, authorising the issue of a Statement of Objections.²³ Under Section 26 of the Competition Law, 1998, CMA by a notice in writing has the power to summon any document or information from any person to which the matter is pertaining.²⁴ Under Section 27 of the UK Competition Act, the CMA through investigating officer may enter any premise related to the matter persisting without a warrant, however a written notice has to be sent, and on such premise take any piece of information or document necessary for the investigation procedure. Furthermore the investigating officer through a warrant given by the in accordance with the rules of the court

²²*Prioritisation principles for the CMA*, COMPETITION & MARKETS AUTHORITY (April 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CM_A16.pdf .

²³*Competition Act 1998: Guidance on the CMA's Investigation procedures in Competition Act 1998 cases*, COMPETITION & MARKETS AUTHORITY, (21 June 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718115/cma_8_drg_cleanversion.pdf .

²⁴ Section 26(1) of the Competition Act, 1998 (UK).

enter the premises in the exercise of his powers under section 27 which he was not unable to do so and that there were reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.²⁵

Therefore the powers of the CMA through investigating officer are very wide in collecting information while entering the premises. The right of the person during such investigation through premises is also recognised in the Rules of the Competition Act, 1998. One such rule is that the occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, CMA officers may wait a reasonable time for legal advisers to arrive.²⁶ Also the powers of the CMA are restricted with respect to the privileged communications.²⁷ Also the act provides protection to the person against self-incrimination that the CMA cannot force a business to provide answers that would require an admission that it has infringed the law.²⁸ Thus this aspect determines that the person called upon during investigation has certain rights and the CMA is authorised to function, not encroaching upon such rights. In the Indian scenario, the same right is being recognised by the present amendment which allows advocate to check upon intimidate depositions and having a fair trial so that the rights of the person called upon during investigation does not infringe and the object of the Act is achieved within the prescribed limits. Such express prohibitions are not there in the Indian Competition Law, and hence this amendment actually acts as a balancer between the rights of the individual and the DG.

Thus, the present amendment is a welcome step because as the Indian Competition Law takes its genesis from European Union, UK, US and other countries, the provision for the protection of

²⁵ Section 28(1) (c) of the Competition Act, 1998 (UK).

²⁶ Rule 4 of the Competition Act, 1998 Rules.

²⁷ Section 30 of the Competition Act, 1998 (UK).

²⁸ Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the United Kingdom by the Human Rights Act 1998.

rights of the person is duly recognised either through allowing them to have an advocate while searching the premise with or without warrant or by either limiting the powers of the authority by not encroaching the human rights during investigation. The similar act has been done by India by the inclusion of such amendment and the limitations imposed is for the better functioning of the Commission and creating a balance by providing the facilities but limiting them in order to have a better understanding to the investigation.

Conclusion

The Competition Act 2002 is a special statute which looks towards promoting economic efficiency and wide in its ambit as it transcends the nationality/place of incorporation of an entity furthermore not limited by the place where an anti-competitive agreement has taken place.²⁹ However the backbone of Indian structure lies in the concept of checks and balances which is also vivid in the Indian Constitution. The need of checks and balances is the pillar of the constitution of India, thus leading towards the concept of constitutionalism; therefore absolute power is not the concept which India strictly follows which can also be inferred from the concept of separation of powers which is not followed in its true sense in India, hence calling it “fusion of powers”.

The present amendment is a clear example to such characteristic aforementioned as it limits certain powers of CCI and provides certain rights to the person called upon deposition during investigation. The purpose of adding such regulation is to protect the rights of the person called during deposition, as well as recognise the presence of an advocate during investigation and the contentions raised claiming that it violates Advocates Act, 1961 is not correct in its finest sense because Regulation 46A (3) provides that the secretary shall forward the complaint to the respective Bar Council of the State where the advocate is a member. Also under sub-clause (2)

²⁹ Haridas Exports v. All India Float Glass Manufacturers Association, A.I.R. 2002 S.C. 2728 (India).

provides that on sufficient ground if Commission finds that the information provided by the DG is sufficient and proves that it amounts to misconduct then only the Commission would debar the advocate. Hence the amendment is a welcome step in the dynamic and emerging field of Competition Law.