

**SCOPE OF DIRECTOR GENERAL'S INVESTIGATION UNDER THE
COMPETITION ACT, 2002**

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ABSTRACT

*The Competition Act, 2002 [“**Competition Act**”] was enacted with the objective to ensure fair competition by prohibiting trade practices that have an appreciable adverse effect on competition [“**AAEC**”] in India. For this purpose, the Competition Commission of India [“**CCI**”] was established and tasked with the duty to: eliminate practices having an AAEC, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by market participants, in India. The investigative wing of the CCI, i.e., the Director General [“**DG**”], assists it in investigations into anti-competitive practices of enterprise(s). Any person aggrieved by the anti-competitive conduct of an enterprise can provide information to the CCI requesting investigation. If the CCI is of the prima facie view that an investigation is warranted, it passes an order under Section 26(1) of the Competition Act, directing the DG to conduct the investigation [“**Prima Facie Order**”]. A Prima Facie Order sets out the facts and contraventions of the Competition Act triggering an investigation by the DG. Oftentimes, the authority of the DG is challenged when the enterprises under investigation are dissatisfied upon being the subject of investigation. Interestingly, considering the recent judicial precedent, as discussed later in this comment, the powers of the DG have been upheld and to a great extent, widened. From such precedent, it flows that the Prima Facie Order permits the DG to rightfully bring within its investigation undiscovered facts, unnamed parties, and unidentified competition concerns. Further, with the Draft Competition (Amendment) Bill, 2020 [“**Draft Bill**”] in the offing, the broad powers of the DG are likely to be amped-up. In this comment, the authors seek to portray the current legal and jurisprudential position of the ambit of the DG's powers of investigation.*

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I. INTRODUCTION

The objective of the Competition Act is to ensure fair competition by prohibiting trade practices that have an AAEC in India. The Competition Act, *inter alia*, prohibits anti-competitive agreements and abuse of dominant position of enterprises, under Sections 3 and 4 of the Competition Act, respectively.

II. INVESTIGATION PROCESS UNDER THE COMPETITION ACT

Under Section 19(1) of the Competition Act, any person, consumer, or their association can provide an information to the CCI, alleging anti-competitive practices and/or abuse of dominant position by an enterprise. To this end, a reference can also be made to the CCI by the Central or State Government or a statutory authority. Upon receipt of such information or reference, the CCI can either dismiss the information under Section 26(2) of the Competition Act at the outset, or direct the DG to investigate the matter if it is of the view that there exists a *prima facie* case of contravention of the provisions of the Competition Act. In the latter case, the CCI passes a *Prima Facie* Order. Thus, the *Prima Facie* Order forms the basis for the DG to initiate its investigation.

Typically, a *Prima Facie* Order sets out the: (a) facts, based on which the CCI comes to the *prima facie* view of contravention of the provisions of the Competition Act; (b) the relevant provisions (i.e., Section 3 and/or Section 4 of the Competition Act) whose contraventions are *prima facie* established; and (c) enterprises that have indulged in anti-competitive practices and whose conduct need to be investigated.

The DG derives its powers of investigation from Section 41 read with Section 36(2) of the Competition Act. These provisions empower the CCI, and by extension, the DG, with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, i.e., to summon and enforce the attendance of a person; examine him on oath; require the discovery and production of documents; receive evidence on affidavit, etc.

During the investigation, the DG collects information from enterprises under investigation, third parties and the informant. Upon conclusion of the investigation, the DG prepares a report of its findings along with the evidence/ documents collected during the investigation. This report, being non-binding in nature, is then submitted to the CCI for its consideration.

There is a possibility that during an investigation, the DG uncovers new facts and events, or discovers that an enterprise has violated certain additional provisions of the Competition Act, that were not mentioned in the *Prima Facie* Order. It may also be possible that certain enterprises which were not named in the *Prima Facie* Order, also indulged in anti-

competitive conduct. Thus, the question that arises is: what is the scope of the DG's investigation? The corollary being – can the DG go beyond the *Prima Facie* Order?

III. JUDICIAL JOURNEY OF THE DG'S SCOPE TO INVESTIGATE

The scope of the DG's investigation was deliberated upon by the Supreme Court ["SC"] in *Excel Crop Care Limited v Competition Commission of India & Others*¹ ["**Excel Crop**"]. In the said case, the Food Corporation of India ["FCI"] filed an information with the CCI, alleging that four manufacturers of Aluminium Phosphide ["ALP"] tablets had formed a cartel to quote identical prices in response to a tender issued by the FCI in 2009 for purchase of ALP tablets.

The CCI passed a *Prima Facie* Order in February 2011 and directed the DG to investigate.² The DG's investigation concluded that the ALP manufacturers (being the enterprises under investigation) had *inter alia* cartelised in relation to the 2009 tender. Subsequent to the CCI's *Prima Facie* Order, another tender was floated by the FCI in May 2011, but no separate information was provided to the CCI against the 2011 tender. However, the DG gave its findings in relation to the 2011 tender as well and concluded that the ALP manufacturers had colluded by collectively deciding to boycott the 2011 tender. The ALP tablet manufacturers challenged the DG's authority to arrive at findings in respect of the 2011 tender before the CCI. However, the CCI rejected the contention *inter alia* observing that the *Prima Facie* Order was not event specific.

Aggrieved, the ALP manufacturers approached the erstwhile Competition Appellate Tribunal ["COMPAT"]. The COMPAT set aside this contention and held that although the DG did not have *suo-moto* powers to investigate any matter that, however, did not mean that the investigation was to be restricted only to the 2009 tender.³ Thus, the language of the *Prima Facie* Order must be taken into consideration. The COMPAT noted that the order in the present case was broad enough to empower the DG to look at all the facts till the investigation was complete. The DG is duty bound to conduct a comprehensive investigation, and in the present case, was correct in considering the 2011 tender as well.

The ALP manufacturers appealed against the COMPAT's decision to the SC, which ruled that the DG was vested with the power to investigate the 2011 tender, as the purpose of a DG investigation is to probe all necessary facts and evidence. Therefore, although the starting

¹2017 8 SCC 47 (SC).

²*In Re: Aluminium Phosphide Tablets Manufacturers*, 2012 CCI 24 (CCI).

³*Excel Crop Care Limited v Competition Commission of India & Ors.*, 2012 Comp AT 104 (COMPAT).

