

**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).

point of the inquiry was the allegations in the information, if other facts were uncovered during the course of the investigation, the DG would be well within its powers to include those too.⁴ Further, in the initial stages, the CCI could not have foreseen or predicted whether the investigation would reveal any violation of the Competition Act and, if so, what the nature of the violation so revealed, would be. Accordingly, the SC held that any restriction of the investigation process would defeat the very purpose of the Competition Act.

Subsequently, on 12 September 2018, the division bench of the Delhi High Court [**“DHC”**] delivered the judgment in *Cadila Health Care Limited & Others v Competition Commission of India & Others*,⁵ [**“Cadila”**], endorsing the view taken in *Excel Crop*. In the abovementioned case, the CCI passed a *Prima Facie* Order directing the DG to investigate the conduct of certain pharmaceutical enterprises that had allegedly denied supply of medicines to the informant. However, the DG also investigated the conduct of Cadila Healthcare Limited [**“Cadila Ltd.”**] (a pharmaceutical enterprise), not named as an enterprise under investigation in the *Prima Facie* Order. Cadila Ltd. challenged the investigation being undertaken by the DG, before the DHC. The DHC set aside Cadila Ltd.’s challenge and observed that at the stage when the CCI takes cognizance of information and directs investigation, it does not necessarily have complete information or facts relating to the pattern of behaviour that affects the marketplace. It can only go by the information provided at the time, and so, the DG is asked to look into the matter. The DG’s investigation may also reveal more enterprises that may have contravened the provisions of the Competition Act. Therefore, the DG’s power is not limited or restricted to matters only included within the *Prima Facie* Order. Cadila Ltd. has now filed an appeal against the DHC judgment before the SC and the same is pending adjudication.

On 10 April 2019, a division bench of the DHC in the case of *Mahindra & Mahindra v Competition Commission of India & Others*⁶ [**“Mahindra Order”**] clarified the scope of the DG’s investigative power. In this case, multiple car manufacturers challenged the DG’s authority to investigate against them. The challenge was on the grounds that the original information filed with the CCI was only against three car manufacturers, namely Honda, Volkswagen, and Fiat India, for indulging in anti-competitive practices. Based on the said information, the CCI passed a *Prima Facie* Order directing investigation against only the

⁴*Excel* (n 1), 36.

⁵2018 252 DLT 647 (DHC).

⁶WP(C) 6610 of 2014 (DHC).

above named three car manufacturers. During the investigation, the DG noted that similar practices were being followed by other car manufacturers not named in the original information and in the *Prima Facie* Order. Through an internal note, the DG requested, and was granted, permission by the CCI to expand the scope of the investigation by including other car manufacturers as well. The car manufacturers contested the CCI's decision before the DHC on the ground that the CCI should have passed a separate *Prima Facie* Order to initiate an investigation against such unnamed car manufacturers. The DHC's judgment heavily relied on the *Excel Crop*⁷ judgment and observed, *inter alia*, that Section 26(1) of the Competition Act refers to action by the CCI directing the DG to inquire into "the matter". Therefore, it is well within the DG's power to investigate the role of other players as well. The car manufacturers have preferred an appeal against the said decision before the SC, pending adjudication.

On 12 September 2019, the division bench of the DHC delivered its judgment in *Competition Commission of India v Grasim Industries*,⁸ ["**Grasim**"] following the law laid down in *Excel Crop*.⁹ In this case, the CCI, in its *Prima Facie* Order, had directed the DG to investigate the conduct of certain enterprises, including Grasim Industries, in relation to anti-competitive practices under Section 3 of the Competition Act. While the DG exonerated Grasim Industries from the violation of Section 3, it concluded that Grasim Industries had abused its dominant position under Section 4 of the Competition Act. Grasim Industries challenged this finding before the CCI on the grounds that the DG could not have expanded the scope to investigate its conduct under Section 4 of the Competition Act, as it was beyond the scope of the original information, and it did not form part of the *Prima Facie* Order. However, the challenge was rejected by the CCI.

Grasim Industries appealed¹⁰ against the CCI's rejection before the single-judge bench of the DHC, which disagreed with CCI's view, and held that the DG cannot expand the scope of investigation beyond the allegation mentioned in the *Prima Facie* Order. The single-judge bench had held that the DG is not competent to travel outside the information or reference. Consequently, the DG would be empowered to investigate a contravention of Section 4 only if the CCI had considered it while forming a *prima facie* opinion under Section 26(1) of the Competition Act. However, the CCI would be entitled to treat the impugned part of the DG

⁷*Excel* (n 1).

⁸[2019] 265 DLT 535 (DHC).

⁹*Excel* (n 1).

¹⁰*Grasim Industries Limited v Competition Commission of India*, [2014] 206 DLT 42 (DHC).

report (the part dealing with abuse of dominant position by Grasim Industries) as an information under the Competition Act and proceed accordingly. The said decision was, thereafter, challenged before the division bench of the DHC, which disagreed with the findings of the single-judge bench in view of jurisprudence laid down in *Excel Crop*¹¹ and *Cadila*.¹²

The division bench of the DHC relied on the SC decision in *Competition Commission of India v Steel Authority of India Limited*,¹³ and observed that the CCI's *Prima Facie* Order is not meant to restrict the opinion that may be formed by the DG upon such investigation. In the present case, the direction to the DG was to investigate "the matter", which not only enabled the DG to investigate the violations set out in the *Prima Facie* Order, but also any other violation that may have come to its notice during the investigation. The DHC observed that the *Prima Facie* Order only triggers investigation. The DG is required to investigate the entire matter, i.e., the allegations made in the information, with all the evidence, documents, statements or analysis collected during the investigation. The investigation must be comprehensive, and the allegations and information mentioned in the *Prima Facie* Order cannot restrict or constrain the DG from examining the violation of other provisions of the Competition Act. Grasim Industries has challenged the said judgment before the SC, and its petition has been clubbed with Cadila Ltd.'s petition involving the same question of law. This petition is currently pending before the SC.

Considering the precedent discussed above, the position that emerges is that the DG has very wide scope to investigate, and the DG's powers are not circumscribed by the *Prima Facie* Order. The DG can expand the investigation to include additional enterprises, facts, events, as well as additional allegations, not originally included in the *Prima Facie* Order.

IV. POWERS OF THE DG UNDER THE DRAFT BILL

The DG's wide powers are reverberated in the recently released Draft Bill.¹⁴ Presently, Section 41(3) of the Competition Act, which refers to Sections 240 and 240A of the Companies Act, 1956¹⁵ ["**1956 Act**"], governs the DG's powers. These provisions empower

¹¹*Excel* (n 1).

¹²*Cadila* (n 5).

¹³2010 10 SCC 744 (SC).

¹⁴ Draft Competition (Amendment) Bill 2020.

¹⁵Under the Companies Act, 1956, the Central Government can appoint an inspector to investigate and report on the affairs of a company/enterprise as per its directions. The powers granted to the Inspector under Sections 240 and 240A of the Companies Act, 1956, shall be applicable to the Director General.

the DG to enter premises of an enterprise(s) under investigation, conduct searches, and subsequently seize any material or information that is pertinent to the investigation [**“Dawn Raids”**]. While the 1956 Act has now been replaced with the Companies Act, 2013 [**“2013 Act”**], the 2013 Act does not contain any provisions corresponding to Sections 240 and 240A of the 1956 Act. To bridge this gap and to solidify the DG’s wide powers in competition law enforcement, the Draft Bill proposes to amend Section 41 of the Competition Act, to explicitly provide the power to conduct Dawn Raids by the DG.

As discussed previously, the current position under Section 36(2) of the Competition Act, is that the CCI is vested with the same powers as a Civil Court while trying a suit. The DG exercises these powers by extension, by virtue of Section 41(2) of the Competition Act.¹⁶ However, the Draft Bill proposes to insert a specific provision empowering the DG to exercise these powers directly. In addition, the DG will now be able to examine, under oath, *“any of the officers and other employees and agents of the party being investigated”*. This provision includes past as well as present officers, employees, and agents. The proposed definition of the term ‘agent’ is wide and includes legal advisors as well.

Further, the Draft Bill proposes to grant the DG the authority to require officers, employees, and agents of the party being investigated, or any other person to *“produce books, papers, other documents, records, and information in their possession”*, which are relevant for the investigation. Presently, while this authority exists with the CCI by virtue of Section 36(4) of the Competition Act, the same authority is not conferred on the DG by extension. Furthermore, as per Section 43(b) of the Competition Act, if any person fails to comply with the directions of the DG while it exercises its powers under Section 41(2)¹⁷ of the Competition Act, such person shall be punishable with a fine of up to rupees 1 lakh for each day of non-compliance, which may extend to rupees 1 crore. The Draft Bill proposes to amplify this penalising provision. It is proposed that any person who fails to produce any documents, information, or records, or fails to appear before, or to answer any questions raised by the DG, shall be punishable with imprisonment of a term of up to six months or a

¹⁶As per Section 41(2) of the Competition Act, 2002, *“the Director General shall have all the powers as are conferred upon the Competition Commission of India under Section 36(2).”*

¹⁷As per Section 36(2) of the Competition Act, 2002, these powers are: *“(a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; and (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office.”*

fine of up to rupees 1 crore, or both, coupled with an additional fine of up to rupees 5 lakhs for each day of non-compliance.

In light of the above discussed judicial precedent recognising the wide investigative powers of the DG, and the proposed enhancement under the Draft Bill, enterprises are required to be cautious. It is possible that an enterprise following an industry practice which is being investigated for being anti-competitive, could be roped into the DG's investigation, although the original information may be filed against its competitor. Thus, enterprises must regularly audit and closely scrutinise their activities to ensure that they are compliant with competition law. On the other hand, it is also necessary, in light of such significant proposed enlargement of the DG's powers, to carve out adequate checks and balances within the Competition Act to ensure that the DG's powers are not unduly or unjustly exercised.