

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

---

**Volume 5 | Issue 2**

---

**2022**

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Investigation by Director General under the Competition Act, 2002: Issues and Challenges

---

DR. SUNIL DESHTA<sup>1</sup> AND REETIKA RANA<sup>2</sup>

## ABSTRACT

*'Investigation' is considered as a key element of enforcement of provisions of any legislation. In India, the Competition Commission of India (herein after referred to as Commission) has been entrusted with the task of enforcing the provisions of the Competition Act, 2002 through its investigative arm- the office of Director General. Thus, Director General has an integral role to play in the enforcement of the provisions of the Competition Act, 2002. In other words, enforcement of the provisions of the Competition Act, 2002 by the Commission is dependent upon the proper functioning of the office of the Director General. No doubt, the Act vests the Director General with the power to assist the Commission in investigating into any contravention of the provisions of this Act. However, there exist various challenges against the nature, scope and jurisdiction of the powers of the Director General. This research paper attempts to examine the challenges raised against the nature, scope and jurisdiction of the powers of the Director General.*

**Keywords:** Investigation, Director General, Competition Commission of India, Competition Act, 2002.

## I. INTRODUCTION

India adopted its modern competition law with the Competition Act, 2002, replacing the Monopolies and Restrictive Trade Practices Act, 1969, which brought about a more comprehensive and effective competition law in place. However, the intent of the Competition Act, 2002 (as amended in 2007) is distinct from any other regulatory laws of India, since the Act distinctly provides separation of adjudication and investigation powers between two different separate statutory authorities. The first authority is the Competition Commission of India (the Commission) which is the adjudicatory/regulatory authority and the second is the office of the Director General which is the investigative wing of the Commission.<sup>3</sup> Thus, the

---

<sup>1</sup> Author is a Professor at Department of Laws, Himachal Pradesh University, Shimla, India.

<sup>2</sup> Author is an Assistant Professor at Himachal Pradesh University Institute of Legal Studies, Shimla, India.

<sup>3</sup> Manas Kumar Chaudhari, Vijay Pratap Singh Chauhan and Sagardeep Rathi, "Investigation by the Director General, Competition Commission of India- A critical Analysis", Vol. 1, *Competition Law Reporter* B-218A (2012)

separation of statutory powers between investigation and adjudication is the cornerstone of the Act and both the statutory authorities are mandated to work in tandem within the confines of the Act to reach to a conclusion in any given anti-competitive matter arising out of an information/filing before the Commission.<sup>4</sup>

## II. ROLE OF DIRECTOR GENERAL IN COMPETITION LAW ENFORCEMENT IN INDIA

Under the Competition Act, 2002, the Competition Commission of India has been entrusted with the challenging responsibility of maintaining market confidence and promoting fair competition in India. Thus, the Commission acts a 'watchdog' for keeping a check on anti-competitive practices through its 'investigative eye'- the office of Director General.<sup>5</sup> The Director General, therefore, is tasked with assisting the Commission in investigating any contravention of provisions of the Act.<sup>6</sup> In other words, enforcement of the provisions of the Act by the Commission is inter-woven with the proper functioning of the office of the Director General. Thus, the role played by Director General constitutes an integral part of the enforcement of the provisions of the Act. However, certain ambiguities exist against the nature, jurisdiction and scope of the powers of the Director General which seems to be a major hindrance in the way of effective enforcement of the Competition Act, 2002 and thorough investigation of anti-competitive conduct.<sup>7</sup>

The issues that lie in respect to the jurisdiction and powers of the Director General which needs to be clarified so that DG can work effectively and efficiently are as follows:

### 1- Whether the power of the Director General is subject to the provisions of Companies Act, 1956 or the provisions of Companies Act, 2013?

For the purpose of investigating contravention of the provisions of the Act, Section 41(3) of

---

<sup>4</sup> *Ibid.*

<sup>5</sup> Anurag Bana, "The Director General of the Competition Commission of India- A "Raid-lating" Force to reckon", Vol.1, *Competition Law Reporter* B-81, 82 (2015).

<sup>6</sup> Section 41 provides:

(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act. 67

[Explanation.—For the purposes of this section, -

(a) the words "the Central Government" under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as "the Commission";

(b) the word "Magistrate" under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as "the Chief Metropolitan Magistrate, Delhi".]

<sup>7</sup> Akansha Mehta, "Power and Scope of Director General under Competition Act, 2002- Challenges and Verdict", Vol. 2, *Competition Law Reporter* B-109 (2015).

the Act vests Director General with all the powers that an inspector has under Section 240 (production of documents and evidence) and 240A (seizure of documents by inspector) of the Companies Act, 1956. Section 240 of the Companies Act, 1956 gives inspector the power to enforce production of documents, to keep books in custody, to examine on oath any past or present employees of the company. Section 240A of the Companies Act, 1956 provides that where an inspector has reasonable grounds to believe that relevant books and papers may be destroyed, falsified, altered or secreted, he may make an application to Magistrate First Class and obtain an order for seizure of such books and papers.<sup>8</sup> However, on 1 April 2014, section 240 and 240A of the Companies Act, 1956 were replaced by Sections 217 and 220 of the Companies Act, 2013 which brought significant changes in the powers of inspector while conducting the investigation. The newly applicable provisions of the Companies Act, 2013 no longer require the inspector to secure a warrant or permission from the Magistrate before seizure of the books and papers. In other words, the precondition of carrying on the investigation “according to the direction of the Magistrate” was omitted and now, only the ‘reasonable grounds to believe’ that the books, papers or other documents will be tampered or destroyed are sufficient alone to give inspector the power to conduct an unannounced investigation under the 2013 wording of the Companies Act. Thus, the new provisions of Companies Act, 2013 have changed the entire dynamics of the Inspector’s investigatory powers who no longer requires a warrant or approval from magistrate to conduct an investigation.<sup>9</sup>

The question now remains whether in any successive investigations the Director General decides to go ahead without the prior approval of Magistrate or continues to seek an approval from magistrate which shall depend on whether the new corresponding provisions of the Companies Act, 2013 will be applicable to Section 41 or not.<sup>10</sup>

The consequences of adopting the new provisions of Companies Act, 2013 can be very significant since the Director General would have larger discretion and power in the process of his investigation. The new provisions of Companies Act, 2013 can in no way said to be against the purpose and objective of the Competition Act, 2002 and would in fact pave the way towards facilitation and speeding up of the procedure of investigation by the Director General. However, such power and discretion can be conferred upon the Director General only by a clear interpretation of the sections by the judiciary or by a Central Government notification.<sup>11</sup>

---

<sup>8</sup> *Ibid*

<sup>9</sup> *Supra* note 3 at B-83.

<sup>10</sup> *Supra* note 5 at B-111.

<sup>11</sup> *Id* at B-112.

## 2. Whether the report of Director-General is Binding or Non-Binding on the Commission?

Section 26 of the Competition Act, 2002 includes all the orders that the Commission can pass to carry out the procedure for inquiry under Section 19 of the Act. Section 26(1) of the Act mandates the Commission to direct the Director General to investigate into the matter in which the prima facie opinion of breach has been formed by the Commission. After receiving the direction from the Commission under sub-section (1) of the Act, the Director General shall submit a report on his findings within such period as may be specified by the Commission.<sup>12</sup> If the report of the Director General does not find any contravention of the provisions of this Act, and the Commission, after consideration of the objections and suggestions from the informant on such report of the Director General, if agrees with the recommendation of the Director General, it shall close the matter and communicate the same to the informant.<sup>13</sup> If the report of the Director General finds 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.<sup>14</sup>

Thus, the law explicitly gives Commission the power to close the matter if the Director General recommends that there is no contravention and to order for a further investigation if the Director General recommends that there is contravention of any of the provisions of this Act. However, it does not explicitly gives Commission the power to disagree with the Director General and close the matter even when the Director General has found a contravention of provisions of the Act in his report. This raises an important question regarding the procedure of investigation by the Director General that whether the report of Director General is binding on the Commission or is merely recommendatory in nature.<sup>15</sup>

Keeping in mind the objective of the Act which was to create a Commission which shall adjudicate matters relating to contravention of the provisions of the Act, therefore, to interpret the provision in such a way to make the report of Director General binding on the Commission would defeat the objective of the Act which will make the whole process of adjudication futile. Thus, it is submitted that this ambiguity must be resolved by either a legislative amendment in the Act or by a purposive interpretation of Section 26 by the Court. due to the inability of the CCI to pass such orders as there is no explicit section or provision giving CCI such powers.

---

<sup>12</sup> The Competition Act, 2002 (Act 12 of 2003), s. 26(3).

<sup>13</sup> *Id.*, s.26(6).

<sup>14</sup> *Id.*, s.26(8).

<sup>15</sup> *Supra* note 5 at B-112.

Since there is no explicit provision which gives Commission power to close the matter while disagreeing with the DG's report which has found contravention, therefore, it is submitted that this calls for either a purposive interpretation to section 26 by the Court or a legislative amendment be in the Act so that ambiguity surrounding the nature of Director General's report be resolved.<sup>16</sup>

### **3. Whether the jurisdiction of Director General is bound by the Commission's order or by the objective of the Act?**

Once the Commission has formed a prima facie view of breach of the provisions of the Act, it orders the Director General to make an investigation into the matter under Section 26(1) of the Act. After receiving the order of investigation from the Commission, all the duties and powers of the Director General mentioned in Section 41 of the Act comes into play. Thus, Section 41 read with Section 26 together determine the extent of power, duty and jurisdiction of the Director General while investigating the contravention of provisions of the Act.<sup>17</sup> While analysing the power given to Director General under section 41 of the Act to investigate contraventions of the provisions of the Act, one crucial challenge faced by the Director General with regard to its scope of power of investigation is whether the Director General can investigate only those enterprises against whom the Commission has ordered an investigation (or against whom the informant party has complained) or the DG can also examine the anti-competitive behaviour of other enterprises which are not mentioned by the Commission. This question remains highly important since it determines the jurisdiction of the DG to conduct investigations.<sup>18</sup>

Giving a plain interpretation to the wordings of the Subsection (1) 41 of the Act which gives power to the Director General to 'assist the Commission, when directed by it, in investigating into any contravention of the provisions of the Act or any rules or regulations made thereunder', it can be said that the subsection only makes a direction by the Commission as a precondition for the Director General to exercise its powers under Section 41. Further, it should also be noted that subsection states 'investigating into any contravention of the Act' rather than 'investigating the enterprises that have been alleged to contravene the provisions of the Act'. Thus, the subsection does not lay down any limitation as to the jurisdiction of the Director General while conducting its investigation.<sup>19</sup>

---

<sup>16</sup> *Id.* at B-114.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at B-115.

The Commission also, while clarifying the scope of Director General's power to investigate parties, pronounced a verdict on this issue in *M/s Swastik Stevedors Private Limited v. M/s Dumper Owner's Association and Ors.*<sup>20</sup>, wherein it stated-

“The Commission does not find any force in the contention of PPSA that the DG had no power to investigate its conduct as there was no allegation against it in the information and the Commission had not ordered any investigation against PPSA as not only some allegations against the stevedores enlisted with DOA (essentially members of PPSA) were made but also because the DG is well within its right to examine the conduct of any other entity also if the same is also related to the alleged anti-competitive conduct.”

Another order passed by the Commission in the case of *In re Alleged Cartelisation by Cement Manufacturer's*<sup>21</sup> is important where a plea was raised by the Opposite Parties that the Director General had investigated only the top 11 cement manufacturers out of 42 companies in the market. The Director General noted that since the top cement manufacturers were controlling the cement market in all the regions, therefore, it focused the detailed investigation only on the top companies. The Commission, while agreeing with the reasons given by the DG in conducting the detailed investigation against only the major cement companies, rejected the plea raised by the Opposite Parties. Thus, the Commission has upheld the jurisdiction, power and scope of the Director General's investigation with the aim of fulfilling the purpose of the Act i.e. to conduct a thorough investigation into alleged anti-competitive behaviour and conduct of erring parties.<sup>22</sup>

In such clear interpretation of power and jurisdiction of the Director General vis-à-vis the purpose and objective of the Act, it can be concluded that the intention of the legislature was not to restrict the power and jurisdiction of the Director General to investigate only those enterprises which have been named by the Commission but was to give the Director General the jurisdiction over all enterprises and persons whom in his judgement might have been involved in the alleged anti-competitive practice or behaviour. Therefore, it can be concluded that the Director General under the Act has been given the jurisdiction and discretion to investigate all those enterprises and companies who might have contravened the provisions of the Act.<sup>23</sup>

---

<sup>20</sup> Case no. 42 of 2012.

<sup>21</sup> Case no. 52 of 2006.

<sup>22</sup> *Supra* note 5 at B-115.

<sup>23</sup> *Id.* at B-116.

### III. SUM UP AND SUGGESTIONS

The Competition Act, 2002 replaced the Monopolies and Restrictive Trade Practices Act, 1969, which was considered unsuited to the India's position as a world's most complex and dynamic growing economy. Under the new regime of Competition Law, the Commission is under obligation to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.<sup>24</sup> The Commission, for that purpose, is assisted by the office of Director General to conduct investigation into contravention of provisions of the Act. The Director General while investigating contravention of the provisions of the Act has been given the power to carry out investigations, collect relevant documents and information regarding the anti-competitive conduct of alleged violators and submit the report to the Commission.<sup>25</sup> Thus, the role of Director General constitutes an integral part of enforcement of the provisions of the Competition Act, 2002 and both Commission and Director General has to contribute in building a robust competition regime in the country. However, the power of Director General conferred upon it under Section 41 of the Act and the nature of report submitted by it under Section 26 of the Act has been subject of controversy and debate since the enactment of the Competition Act, 2002. In order to avoid the confusion surrounding the nature of Director General's report- binding or not binding should be cleared and accordingly either a clear provision under section 26 needs to be introduced by way of legislative amendment or clarified by way of judicial interpretation.<sup>26</sup> Further, the issue of the scope and extent of the Director General's power especially Director General having the same powers as are vested on the Inspector under the Companies Act, 1956 creates uncertainties with the replacement of the Companies Act, 1956 with the Companies Act, 2013. No doubt, in the year 2012, the Competition (Amendment) Bill, 2012 was introduced in Lok Sabha which aimed to grant significant powers to the Director General for conduction an investigation by removing the requirement of seeking permission from magistrate before conducting search and seizure operations.<sup>27</sup> But unfortunately, the bill lapsed with the dissolution of the 15<sup>th</sup> Lok Sabha in May 2014. However, the bill needs to be re-introduced since the provisions in the bill concerning inspection, inquiry and investigation, resonate with the implementation of the relevant provisions of the Companies Act, 2013 which will help in resolving the ambiguities and loopholes surrounding the nature and scope of power of the Director General and

---

<sup>24</sup> *Supra* note 10, s. 18.

<sup>25</sup> *Id.*, s. 41.

<sup>26</sup> *Supra* note 5 at B-116.

<sup>27</sup> *Supra* note 3 at B-85.



facilitating the investigation process required for the effective enforcement of Competition Act, 2002<sup>28</sup>

\*\*\*\*\*

---

<sup>28</sup> *Id* at B-86.