

# ADVERSE EFFECT OF COMPETITION COMMISSION OF INDIA'S DECISIONAL PRACTICES ON THE WORKING OF DIRECTOR GENERAL UNDER COMPETITION LAW REGIME

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## ABSTRACT

*The Objective clause of the Competition Act 2002 gives some hint of the Director General being an independent body, but this independence is adversely affected by the Competition Commission of India's decisional practices. Proximately speaking, it's been only two decades since the Competition Act has come into existence yet the Competition Commission of India has been versatile in dealing with cases from airlines to fans in Railways, Federation of Indian Chambers of Commerce and Industry to daily soap producers, Board of Control for Cricket in India to stem cell banks, and all this approves that there is a necessity of the Competition Commission of India being an expert body. In its first seventeen years, it has given 632 orders of which more than half were appealed before Competition Appellate Tribunal and almost one fourth were remanded back to the Competition Commission of India.*

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*The Competition Commission of India and the Director General both have been given wide powers in the Act. While the Competition Commission of India can take suo moto<sup>1</sup> cognizance of any case, it can also form prima facie opinion without even hearing parties.<sup>2</sup> The Director General, on the other hand, has the power of investigation and also to add new parties when investigating for appropriate impartation of justice.<sup>3</sup> The role of the Competition Commission of India is noteworthy in the Indian economy as its decisions and conduct affects not only the parties and market but also other regulators. The Competition Commission of India has been given enormous power to inquire and impose fines, award leniency and grant compensation, make regulations and cause implementation. It should base its decision on cost benefit analysis. The Director General, being a part of Competition Act, also plays special task but to what extent can he work in a silo and make autonomous and equitable decision is important to be analyzed. Due to the sordid actions taken by the Competition Commission of India, it has been continuously reminded by COMPAT of principle of natural justice, due process to be followed by it as it has failed to observe the same in various situations like order being signed by members other*

<sup>1</sup> Section 19, Competition Act 2002.

<sup>2</sup> Google Inc. & Ors v Competition Commission of India & Ors. (2015) 150 DRJ 192 (DB)

<sup>3</sup> M/s Alkem Laboratories Pvt Ltd. v the Competition Commission of India, [2016] Comp AT 96.

*than those who heard the parties,<sup>4</sup> or order being passed in absence of the chairperson, order being given without mentioning reason for it,<sup>5</sup> relying on information which was not part of the Director General report and no chance of hearing given to parties.<sup>6</sup> The Director General's report forms the bedrock for the decision and it is thus required that he performs in consonance with the provisions of the Act.*



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<sup>4</sup> M/s Peeveear medical agencies, Kerala v All India organisation of Chemists and druggists 2013 SCC OnLine CCI 147.

<sup>5</sup> Interglobe Aviation Ltd. (Indigo Airlines) v Competition Commission of India 2016 SCC OnLine Comp AT 291.

<sup>6</sup> The Board of Control for Cricket in India v Competition Commission of India. (2015) 128 CLA 186.

## Introduction

Independence<sup>7</sup> of an entity to work and its regulation by rules lays down the foundation stone of a strong system. This can be understood better by referring to the story, “The Butterfly”, in which a boy noticed a cocoon and was inquisitive as to see how the colorful insect actually enters the world. One fine day, the boy notices an aperture through which the butterfly was trying to come out. After sometime, the progress stopped and there was no advancement in the hole. Thus, the boy decided to help butterfly and with a pair of scissors sliced off the remaining cocoon. Though the butterfly came out of the cocoon but it had wrinkled wings and inflated body and was never able to fly. This suggests that when we try to hinder the natural or actual way of some process, it usually imbalances it's working. The same way independence of an authority (i.e., the Director General) should be maintained even when there is a point of convergence between its power and the power of some other authority (the Competition Commission of India).

So, if given time as is laid down in the act is followed (nature's rule for the butterfly) by the the Director General and the same is not hindered by the commission by asking for re-investigation.

## Statutory Independence of the Director General

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Statutorily, it is clear that an Investigation is to be done by the Director General and inquiry by the Competition Commission of India.<sup>8</sup> While an investigation involves collecting evidences and examining them, it antecedes inquiry where determination is done and therefore, both are different stages of decision-making. Sections 7 and 17 makes it amply clear that while the Director General is appointed to assist the Commission, the Commission is composed for conducting inquiry and have distinct body of members than those of the Director General. The Commission is a body corporate while the Director General is an investigating officer. Also, Regulations 41, 44, and 45(3) of General Regulations<sup>9</sup> clearly state that for taking evidence, to call for information, issuance of commission, the decision is independently to be taken by the Director General *or* the Commission. In addition to this, both the Competition Commission of India and the Director General are individually asked to maintain confidentiality. Had they been working together as a unit, legislatures wouldn't have asked the Director General to

<sup>7</sup> Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/independence> (last visited on Feb. 27,2021).

<sup>8</sup> Section 26, Competition Act 2002.

<sup>9</sup> The Competition Commission of India (General) Regulations, 2009.

separately to maintain confidentiality. However, one contradiction to the abovementioned can be seen in Section 43 where the authority is given to the Competition Commission of India to punish the parties in case of failure on the part of parties as to comply with the direction of the Director General. Also, the investigation reports are not made public and it is under the control of the Commission as to what deserves to be mentioned in the order.

In different cases it has been traced that the Director General has taken various decisions independently while investigating such as refusing to cross-examine, refusing the presence of advocates while conducting investigation,<sup>10</sup> denying of access to copy of prima facie order of the commission to parties,<sup>11</sup> adding new parties to the investigation.<sup>12</sup> In all these cases, it is noticed that the Director General has on his own taken decision without asking the Competition Commission of India for it.

Here, the Director General's relationship with the Competition Commission of India can be compared with that of the Central Bureau of India and the Government. The way the Central Bureau of India is appointed by the Government but yet is provided autonomous and independent status as to maintain transparency and balance in decision making process. Now, if we see the procedure for recruitment<sup>13</sup> as well as promotion<sup>14</sup> of the Director General Office, it is done by a committee which is composed of the Competition Commission of India Chairperson, Secretary of Ministry of Corporate Affairs and experts decided by the Central Government. Not only this, all these rules are laid down by Government and they have authority to amend them. Thus, the Director General cannot be said to be merely working as a body under the control or supervision of the Competition Commission of India. It has its own independence and standing under competition law regime. Also, Rule 9,<sup>15</sup> states that if any situation arises for which there is no rule, the Competition Commission of India should refer the same to Central Government for decision. The Competition Commission of India cannot directly appoint or promote the Director General. Though the power of *suo moto* investigation has been taken away from the Director General but it has autonomy to conduct investigation

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<sup>10</sup> the Competition Commission of India v Oriental Rubber Industries. (2018) 251 DLT 137

<sup>11</sup> *Supra* 2

<sup>12</sup> *Supra* 3

<sup>13</sup> Schedule, Competition Commission of India (Director General) Recruitment Rules 2003.

<sup>14</sup> Schedule III, Competition Commission of India (Number of Additional, Joint, Deputy or Assistant Director General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009.

<sup>15</sup> Competition Commission of India (Number of Additional, Joint, Deputy or Assistant Director-General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009

in a manner it believes is fit for delivery of justice and to defend the case. The Director General works as per the powers enshrined to it through law and the Competition Commission of India can only act as watch dog to it but cannot interfere in it.

The *Raghavan Committee* has stated that the Director General Office is the investigative wing of the Competition Commission of India and the same should be separated from the prosecutorial wing to maintain transparency and to balance the interest.<sup>16</sup> It also gives details about a situation in which there is merger of the two wings. i.e., the Director General exercising both investigative function under Section 41 and prosecutorial function under Section 35. In the same report, it also stated that the two wings have to work independent of each other. Thus, although it may be claimed that the Director General is a part of the Competition Commission of India. it is independent of it, as the Competition Commission of India has to exercise prosecutorial and adjudicatory functions and not investigation.

Under the Monopolies and Restricted Trade Practices Act 1969, the Director General could *suo moto* investigate while under the Competition Act, the same can only be done with prior authorisation of the Competition Commission of India. The powers granted to the Director General are narrower as it can only cause investigations into matters that are referred to it by the Competition Commission of India. But by the 2012 Bill<sup>17</sup> this restriction has been removed as it suggests certain amendments in Section 41 which gives more power to the Director General and for this he “may” take authorisation from the Competition Commission of India. Thus, discretion has been left to the Director General to either get prior authorisation from the Competition Commission of India or not. The Bill demands to be reintroduced in the assembly again as the same has lapsed with time.

Immenseness of the Director General’s discretion can be understood by following aspects:

If we refer to *Lafarge India ltd. v the Competition Commission of India*,<sup>18</sup> the Director General exercising his independence used the data dated prior to that of 2009, i.e., before the provision of the Act came into force. In *All India Tyre Dealer’s Federation v Tyre Manufacturers [2013] CCI 14*, the Commission, while passing order under Section 26(1) of the Act, did not specify any period for investigation as at that stage it would not be desirable to curtail the period of

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<sup>16</sup> The Indian Competition Law, [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf) (last visited on Feb. 28, 2021).

<sup>17</sup> The Competition (Amendment) Bill, 2012.

<sup>18</sup> [2015] Comp AT 892

examination by the Director General and left it on the Director General to decide. While exercising its power of truth-finding the Director General has the authority to summon someone and to ask questions of his choice. The Director General has the right to decide the pattern or manner of investigation: In *Coimbatore Spg. & Wvg. Co. Ltd. v M.S. Srinivasan*<sup>19</sup>, the Court held that it is the Director General's absolute discretion to opt for an inquiry procedure for taking of evidence, examination of parties and documents in cases which are complicated.

### **How the Competition Commission of India has Curtailed the Director General's Independence**

The Director General is considered to be a part of the Competition Commission of India as when the direction is given by the Competition Commission of India to the Director General to investigate, it is an administrative function of transfer to a wing of the Competition Commission of India itself departmentally and it is not an adjudicatory decision. Section 16 of the Act states that the Director General is to be appointed to "assist" the Commission and the Competition Commission of India is not bound by its decision. But yet, being a part of the Competition Commission of India does not give it the authority to affect its independence.

The Competition Commission of India has the power to curtail the power of appearance of the Director General before it under Section 35 through Regulation 3(5)(b), which states that "subject to Section 35 of the Act, the Secretary and such other officers and persons as permitted by the Chairperson shall attend an ordinary meeting." But the presence of the Director General is mandatory for the special meetings, as regulation 3(6)(c)(i) states the Secretary, for all *special meetings*, shall – arrange to prepare and record the minutes of every meeting of the Commission and after obtaining the approval of the Chairperson circulate them amongst the Members, the Director General and the senior officers.

### **The Competition Commission of India's Regulating Authority over the Conduct of the Director General**

A collective reading of Sections 26(1), 26(7), 16, and 41, and Regulation 20(6) leads to the conclusion that the investigating power of the Director General are restricted and limited to what the Competition Commission of India authorises and directs it to do. Under Section 43(b)

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<sup>19</sup> AIR 1959 Mad 229, (1959) 1 MLJ 254.

it is the Competition Commission of India that punishes party for failure of compliance with direction of the Director General.

Section 41 and Tulip case<sup>20</sup> [2015] CCI 66, makes it very clear that the Director General has to undertake investigation when it is so directed by the Competition Commission of India, grounds for this are not mentioned in the statute. Under the MRTP Act, the Director General could *suo moto* start investigating any case.

Explanation to Section 41 also reflects that it is “the Commission” whose prior approval would be needed by the Director General to exercise powers given under Sections 240 and 240A of the Companies Act. It is proposed under the 2012 bill that the Director General can initiate the investigation proceedings with the consent of the Commission rather than prior approval of the magistrate. This has been suggested so as to empower the Competition Commission of India more.

In the *Excel Crop* case<sup>21</sup>, the Supreme Court held that the conduct of the Director General is regulated by the “language of the Competition Commission of India’s order”. In this case, it was noticed that the Competition Commission of India, by its order in *Excel Crop*, had given authority to the Director General to investigate in matters which sprung up before Competition Act came into force. In the *Tyres*<sup>22</sup> case, the Competition Commission of India considered the Director General to be a part of the Competition Commission of India itself as it stated that “As the proceedings before the Commission are inquisitorial in nature it would not be appropriate to restrain the Director General from fully examining the allegations of cartelization in the tyre industry”.<sup>23</sup> Thus, the Director General being part of the Competition Commission of India has to follow inquisitorial method. In *Shamsher kataria v Honda Siel Cars India*<sup>24</sup>, the Director General took prior consent of the Competition Commission of India to add more parties and the same was done by it. The Director General is bound to act within the boundaries of what is directed by the Competition Commission of India and prior permission is necessary. In *Express Industry*<sup>25</sup>, Commission made it clear that it may issue notice to the Director General to appear if it does not agree with the Director General’s report, but this cannot be enforced as right by parties, thus the Director General’s right is subject to

<sup>20</sup> Shri Jyoti Swaroop Arora v M/S Tulip Infratech Ltd (2015) CCI 66.

<sup>21</sup> Excel crop care limited v Competition Commission of India (2017) 8 SCC 47.

<sup>22</sup> All India Tyre Dealer’s Federation v Tyre Manufacturers (2013) CCI 14.

<sup>23</sup> SAIL v Competition Commission of India (2010) 10 SCC 744.

<sup>24</sup> Hyundai Motor India Ltd. v the Competition Commission of India (2018) SCC OnLine NCLAT 513.

<sup>25</sup> In re: Express Industry Council of India and jet airways and others (2013) CCI 30.

commission's reasonable discretion. In *M/s Gulf Oil Corporation Ltd. v the Competition Commission of India & Ors.*,<sup>26</sup> it was contended by parties that if the Competition Commission of India does not agree with the Director General's report of no contravention, the only option it has is to either call for objections and then close the matter or to direct further inquiry or investigation but the Court held that the Director General's report is only of recommendatory value stating that Section 26 gives the Competition Commission of India the independence and power to make an order directly under Section 27 if there is contravention as per the Competition Commission of India irrespective of the Director General's findings on non-contravention. The case has made it clear that the Competition Commission of India if feels that the standard was set as that only in cases of the Director General's failure of conducting proper inquiry or where further inquiry is required, it can go for Section 26(7). If it does not it can directly take resort to Section 27. General rule is to make decision based on the Director General's report while in exceptional cases where there is no agreement and further inquiry is required, the order can be made under Section 26(7). There was confusion as to absence of any explicit power given to the Competition Commission of India to reject and disagree with the Report of the Director General, the same was addressed here and held that the COMPAT made it clear that the Director General report is merely recommendatory and not binding on the Director General. The reason behind not making Section 26(6) and 26(8) appealable was that as before 2007, Supreme court would get burdened with appeals.<sup>27</sup> Also, in *New Central Jute Mills Co. Ltd v Deputy Secretary*<sup>28</sup> it was held that the Director General merely has to do fact finding and he cannot adjudicate or give decision and his report/ finding is not binding on the commission.

Dichotomy between Section 36 providing Principle of Natural Justice and 26(4), as Principle of Natural Justice cannot be restricted merely as to hearing the parties and includes the right of parties to be given a chance of hearing and documents should be provided to them before that.<sup>29</sup> Thus, when the Director General's report is not provided to them under Section 26(4), then this is a failure in imparting justice. Section 26(4) was amended as to substitute "shall" with "may"

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<sup>26</sup> [2013] Comp AT 122.

<sup>27</sup> Competition Commission of India, [https://www.cci.gov.in/sites/default/files/592011\\_0.pdf](https://www.cci.gov.in/sites/default/files/592011_0.pdf) (last visited on Feb. 22, 2021).

<sup>28</sup> 1966 36 CompCas 512 Cal.

<sup>29</sup> Legal Services India, E-journal, <http://www.legalserviceindia.com/legal/article-1659-principles-of-natural-justice-in-the-light-of-administrative-law.html> (last visited on Feb. 27, 2021).



and now the Competition Commission of India is not bound to provide the Director General's report to the parties, while the same is mandatory if the party is CG, SG, or any statutory authority. There is no justification as to such discrimination. Not hearing parties when direction being taken under Section 26(1) is justified as the Competition Commission of India must maintain its objective of being efficient but the same is not justified under Section 26(4). The Competition Commission of India did not consider the Director General's view on relevant market, the Competition Commission of India was only given an opportunity to address the views formed by the Director General in relation to the definition of relevant market. However, the Competition Commission of India, in its order, relied on an analysis and definition of the relevant market that was manifestly different from the definition of the relevant market in the Director General's report. As such, the Competition Commission of India never had an opportunity to contest the relevant market definition that formed the basis of the Competition Commission of India's decision. The COMPAT viewed this as a violation of the principles of natural justice as the Competition Commission of India was not heard in relation to the specific allegation on the basis of which it was found guilty. Media rights clause was also not determined by the Director General and thus was not dealt with in the Investigation stage, (nor was it discussed during inquiry by the Competition Commission of India.) Thus, there was no opportunity given to parties to answer and address the same. Thus, the Competition Commission of India failed "due process of law".

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The Competition Act has also taken away the power of taking *suo moto* cognizance from the Director General. Therefore, the Director General's position of watchdog has been taken away in the same way the power of the butterfly was taken away. In addition to this, statute has impaired the Director General by not including him in the meetings as well. Meeting of the Commission is done as per Section 22 and members have to be present in such meeting to exercise their power of vote. While the Commission holds meetings for various purposes such as to discuss on various issues raised by parties and the Director General in its report, the Director General is not a part of it. Disclosure to public is an important aspect which is done to sustain competition in market (brings transparency). Report of the Director General is not available online even when there is distinct provision for confidential and non-confidential reports.

## COMPAT's Deferential Treatment towards the Director General's Investigation

During 2016-2017, the Competition Commission of India went against the discovery of the Director General and both the cases when appealed before COMPAT were remanded back. In *Sunil Bansal & Ors. v M/s Jaiprakash Associates Limited (JAL) & Anr*,<sup>30</sup> the minority view agreed with the findings of the Director General that the respondent was in a dominant position while the same was opposed by the Competition Commission of India in its order for which it in fact failed to provide proper reasoning and thus was violative of PNJ and remanded back by COMPAT to the Competition Commission of India. Such failure if not corrected may lead to more litigation and appeals.

In *Interglobe Aviation Ltd. (Indigo Airlines) v Competition Commission of India*<sup>31</sup> the Competition Commission of India did not make any hint as to its disagreement with the Director General in the oral hearing and later also failed to provide notice to the parties as to his dissent from the decision of the Director General. The COMPAT pointed out that this resulted in failure to provide the parties the opportunity of hearing and defending. Also, no reason was given for such disagreement by the commission. The COMPAT directed the Competition Commission of India to re-consider the Director General's report and then decide under Section 26(8). In the *Competition Commission of India v Surinder Singh Barmi*,<sup>32</sup> Competition Commission of India's definition of relevant market changed from that of the Director General concluded in the investigation report, but the Competition Commission of India was not given the chance to defend the same.

### Appeal before the COMPAT

One big loophole which affects the Director General's position is that when there is violation found by the Director General but the Competition Commission of India does not find any violation, there is no provision given under Section 53A to make this appealable.<sup>33</sup> When we read this with the interpretation of Section 35 in *Express Industry*<sup>34</sup>, the Competition Commission of India interpreted that the Director General cannot be called up as a matter of right to present. So there exists a void in the legislation and the same has not been interpreted

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<sup>30</sup> [2015] CCI 162.

<sup>31</sup> 2016 SCC OnLine Comp AT 291.

<sup>32</sup> [2013] CCI 25.

<sup>33</sup> Competition Commission of India v SAIL (2010) 10 SCC 744.

<sup>34</sup> Express industry & Competition Commission of India 2018 SCC OnLine CCI 11.

in the light of PNJ by the Competition Commission of India exercising its wisdom. In *All India Tyre Dealers Federation v Tyre Manufacturers*, the Director General's finding was different from that of the Competition Commission of India. While the Director General found that there was cartelisation amidst the players, the Competition Commission of India disregarded this holding insufficiency of evidence.<sup>35</sup> The Competition Commission of India has again failed to be coherent and has changed its approach for analysis of economic evidence from that held in *Cement Cartel*<sup>36</sup> case dismissed the appeal on the ground that the order not passed under Section 27, now the issue related to failure of appeal provision from a situation where the Director General finds violation but the Competition Commission of India does not agree with the Director General. There is no reason behind not providing for appeal in such situation. Further, in the *Ashriya* case,<sup>37</sup> where three separate reports were filed, the Director General held that Indian Railway was in a dominant position and there is abuse of dominance in the relevant market too. While the Competition Commission of India reversed this, COMPAT dismissed the appeal as there was no violation of Section 4 held by the Competition Commission of India.

### Right to Appear and Defend

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The Director General acts as the custodian of rights of the public as it has the authority to appear before the commission. In many cases,<sup>38</sup> common ground taken for argument by parties is that the Director General has exceeded the scope of its investigation and the same can be addressed better if the Director General utilises his right granted under Section 35.

The COMPAT being a judicial body<sup>39</sup> protects due process<sup>40</sup> of law and did the same in *Express Industry*<sup>41</sup> while remanding back the case to the Director General. The "due process of law" is to be followed by the Competition Commission of India and the Director General, being a quasi-judicial body<sup>42</sup> but it has failed time and again.<sup>43</sup> In *Express Industry* too it was held that the Director General's appearance cannot be claimed as right by parties. But it is suggested that the Director General should be given mandatory chance of appearing specially in cases where the Competition Commission of India takes contrary view. Furthermore, Regulation

<sup>35</sup> *All India Tyre Dealers' federation v Tyre Manufacturers* (2008) RTPE 20.

<sup>36</sup> (2012) CCI 42.

<sup>37</sup> *Arshiya Rail Infrastructure Ltd. v. Ministry of Railway (MoR) & Ors.* [2012] CCI 52.

<sup>38</sup> *In Re: Delhi Jal board v Grasim Industries Ltd.*, 2017 SCC onLine CCI 48.

<sup>39</sup> Composed of judicial officers (retired judges of Supreme Court and CJ of High Court).

<sup>41</sup> *Supra* 33.

<sup>42</sup> *Steel authority India Ltd. v the Competition Commission of India.* (2010) 10 SCC 744.

<sup>43</sup> *Express Industry*, COMPAT 2018 SCC OnLine CCI 11.

21(9)<sup>44</sup> makes it mandatory by taking away their right, i.e., failure of due process. “Justice should not only be done but should manifestly and undoubtedly appear to be done” as they are imposing penalty and deciding the right of parties. This will also affect the EFFICIENCY of disposal of cases as the parties may appeal later.<sup>45</sup>

Drawing analogy from Rudyard Kipling’s work<sup>46</sup>, where he discovers that east lies in the eastern shore of the Earth and west on the opposite end and both are equally important yet cannot meet, In the same way Investigation and Prosecution can be understood to be the twain which possibly cannot meet as Investigation is the precursor stage and the Director General at this stage acts independent of the Competition Commission of India. But at the same time, it is also advisable for the two offshores to meet for better administration of justice and the same has been ensured by Section 35.



### **The Competition Commission of India: An Expert body: For Efficient Disposal of Cases**

In *Brahm Dutt v Union of India* (2005) 2 SCC 431, it was made clear that the Competition Commission of India is expected to be an expert body and need not be composed of members of judiciary.

The Objective clause of the Competition (Amendment) Bill 2012 lays down that the Competition Commission of India is an expert body which would perform multiple functions such as regulation, advisory role, penalising acts. Members of different fields contribute and help in analysing the issues in an effective manner.<sup>47</sup>

Recent measure of “*right-sizing of the Commission*” from seven to four members to increase the rate of speedy decision<sup>48</sup> also suggest how important it is for the Commission to maintain

<sup>44</sup> The Competition Commission of India (General) Regulations, 2009.

<sup>45</sup> Express industry & Competition Commission of India 2018 SCC OnLine CCI 11.

<sup>46</sup> The Ballad of East and West, [http://www.kiplingsociety.co.uk/poems\\_eastwest.htm](http://www.kiplingsociety.co.uk/poems_eastwest.htm) (last visited on Feb. 27, 2021).

<sup>47</sup> Lafarge v the Competition Commission of India [2015] Comp AT 892.

<sup>48</sup> Priyanka Mittal, *Cabinet approves downsizing of Competition Commission of India*, Mint ( Feb. 27, 2021, 1:07 PM), <https://www.livemint.com/Companies/5fAMm5R5q1d1Yf5c6XELjM/Cabinet-approves-downsizing-of-Competition-Commission-of-Ind.html>.

efficiency. For any public office, efficiency matters a lot and the same can be achieved by various programs as suggested by the author like organising work in a more rational way and by enhancing the knowledge and experience. The latter was done by introducing the qualifications for the Director General post but for the former part, some lacunas still exist. If we see the Indian Competition Commission which comprises of various bodies and members and performs various tasks like competition advocacy, legislative role of forming regulation, inquiry and investigation through the Director General, adjudicatory function and also performs the role of appointing authorities, *suo moto* cognizance of cases, making of annual reports.

It is settled law that the Preamble has subtle effect on the interpretation of the provisions of the Act.<sup>49</sup> The Preamble of the Competition Act 2002 reflects that efficiency of the Commission in decision making is required and is of utmost importance for the welfare of consumer and economic development of the nation. The investigation report by the Director General should be made timely for efficient redressal. Referring to the old MRTP *Cement Case*<sup>50</sup> which took almost 17 years to decide the stand of cartelisation and the remedy given was merely to cease and desist the unlawful act. Thus, failing the object of the Act which specifically mentioned efficiency to be maintained by MRTP Commission.

Although Section 26(3) leaves the right of determining time for the investigation on the Commission, which has laid down in its Regulation 60 days compliance period. The rules would go futile if the same is not exercised properly.

The rationale behind maintaining authority with the Competition Commission of India is that the Commission should make decision based on the bulk of cases<sup>51</sup> pending before it and in some cases, it may ask the Director General to furnish the report even sooner. Thus, providing time frame for the investigation.

The objective of the Act clearly focuses on efficient working of the Commission. The MRTP Act explicitly mentioned under Section 66(1) that Commission has the authority to make regulations for the “efficient” performance of its functions. Although this explicit mention is not there in the Competition Act yet if we notice the provision of the Act read with the General Regulation, both prescribe the appointment of authorities and officers for the efficient working of the act. Also, the Act provides various provisions restricting the time limit to few months

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<sup>49</sup> Shri Ramakant kini v Hiranandani hospital, [2014] CCI 37.

<sup>50</sup>In re: Alleged cartelization by Cement Manufacturers 2006 RTPE 52.

<sup>51</sup> Deputy Chief Materials Manager, Rail Coach Factory vs. M/s Faiveley Transport India Limited & Others, Ref 06/2013. [2016] Comp AT 54

and days e.g., sixty days for appeals to be decided. The Regulation drafted by the commission under the power given to it under Section 64(1) lays down that the Director General should submit the investigation report within a period not exceeding sixty days.<sup>52</sup> While Supreme Court's direction in *Steel Authority of India Ltd*<sup>53</sup>, stated that even in cases of explicit mention of the time period in the statute, the commission being a body constituted for consumer's welfare should aim at disposing of the said duty as expeditiously as possible. To elaborate more on efficiency, in the Annual Report of 2009-10, Chairperson Dhanendra Kumar stated that he hopes that competition commission will work for making the business practices more efficient and competitive.<sup>54</sup>

### **Efficiency as Prescribed in Words and Described by Actions**

The emphasis is on the Director General's report as it is the stepping stone to begin inquiry into the matter. And thus, if this is delayed the entire proceeding remains pending. The apex court directed the report to be submitted within the time period as "directed" by the Commission. While in the judgment the court mentioned that the period that they have "specified" shall be strictly followed till any other regulation is framed fixing the time limit for the three stages of inquiry, investigation, and appeal. While in General Regulation under Regulation 20(2), uses the term "specified" and specifies a period of sixty days. Even the procedure dealing with the supplementary report under Regulation 20(6) specifies a period of time, i.e., 45 days. Following this reasoning, we can find out that the intention of the legislature and Supreme Court behind using the term "specified" instead of merely "prescribing" was to bring enforceability to the said clause. While prescription merely gives a recommendation to the order, specifying the same brings legality to it.

In all the orders passed by the Competition Commission of India it states that the Director General should not get affected by the findings of the commission and also that it should submit the report within 60 days. But it is very rare to see the Director General follow this.

#### **The Director General's Failure to Submit Investigation Report within the Time Specified**

From our analysis of 85 cases (orders dated 10.01.2013 To 1.05.2018), while the regulation makes it mandatory for the Director General to submit the report within 2 months (60 days)

<sup>52</sup>Kingfisher Airlines v Competition Commission of India (2011) 108 SCL 621.

<sup>53</sup> CCI v SAIL (2010) 10 SCC 744.

<sup>54</sup> Competition Commission of India Annual Report 2009-2010 , <http://www.Competition Commission of India.gov.in/sites/default/files/annual%20reports/PubAnnRep0910-060911.pdf> (last visited on Feb. 27, 2021).

only for 2 cases the Director General could manage to submit the report within 2 months. In addition to this we have found that the Director General has taken more a year in 25 out of 85 cases. Despite the guidelines issued in SAIL<sup>55</sup> related to the Director General's duty of being efficient, it has failed. As per regulation, supplementary report can be asked by commission in certain cases which has to be submitted within 45 days, In the given 85 cases the Competition Commission of India ordered for further investigation 11 times and it was twice that reports were furnished within 45 days.

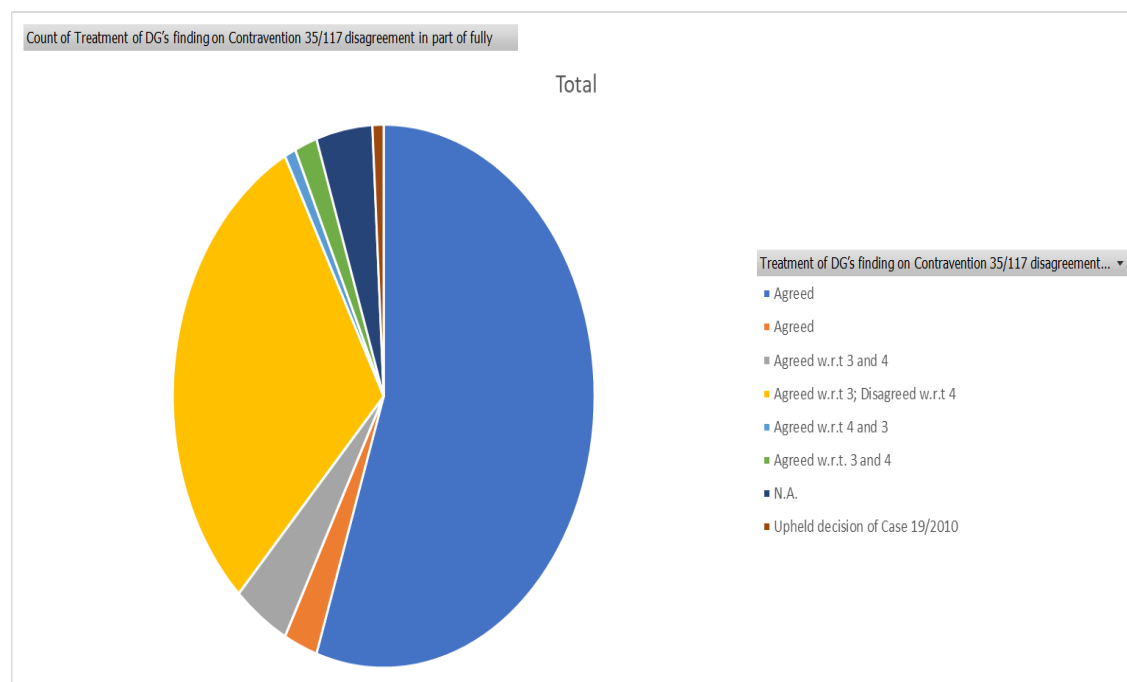
*Supplementary Reports: One of the Various Causes of Delay*

Annual report 2016-2017 reflected on the retardedly long investigations which are consuming more time than ever before. One reason for this was mentioned to be insufficient strength of staff at the Director General office and other reason is the intricate and complex nature of cases before the Director General. In some cases, further investigation was also referred so as to get supplementary report. From 100 new cases that were referred in the annual period, only 23 were disposed of by the Commission.

Data from annual report 2016-2017:

S.no.	Matters:	Original matters	Supplementary	Total
1.	Cases pending and continued	52	16	68
2.	Received new cases	100	11	111
3.	Disposed cases	23	14	37
4.	Cases not disposed off	129	13	142

<sup>55</sup> *Supra* 52.



## Lack of coherence in the Competition Commission of India's Decision Making

Although the Competition Commission of India is not bound by its precedents for being a non-legal body but if they depart from their previous reasoning they should substantiate the same as this has its consequential effects on the Director General as well. Lack of coherence affects the Director General's investigation. For example, the assessing term "agreement", in steel producers,<sup>56</sup> the opinion of consumers was taken into consideration or using the congruence and conscious test in Neeraj Malhotra, these were not followed in *Express Industry* case. Also, if we see the usage of various tests for explaining the standard of proof, commission has taken for different views like; only plausible explanation in *Express Industry* while preponderance of probability was used in *Tulip* case.<sup>57</sup> Also, the understanding of the term "agreement" was standardised in Neeraj Malhotra<sup>58</sup> but the same was not followed in Federation of Indian Chambers of Commerce and Industry case<sup>59</sup>. Absence of cohesiveness on the Competition Commission of India's part the Director General's efficiency and independence.

<sup>56</sup> the Competition Commission of India v Steel Authority of India Ltd. & Ors. (2010) 10 SCC 744.

<sup>57</sup> Jyoti Swaroop v M/s Tulip Infratech Ltd. [2015] CCI 66.

<sup>58</sup> Neeraj Malhotra v Deutsche Post Bank Home Finance 2009 CCI 5..

<sup>59</sup> FICCI v United Producers Forum 2009 CCI 1.



Preliminary Investigation as was in MRTP may help reduce delay as it reduces burden of supplementary reports, re-investigation to be conducted in future. Statutorily, the Competition Commission of India is expected to be an expert body but the same is composed of bureaucrats in reality. As per Section 26 the cases go to the Competition Commission of India for prima facie opinion and going by 2016-2017 Annual Report<sup>60</sup>, while in 167 cases the Competition Commission of India found that there exists *prima facie* contravention, only in 52 cases it found that no prima facie violation was there. So, the Competition Commission of India as it lacks expertise very rarely gives order under Section 26(2). So, its decision increases the burden on the Director General who has to investigate in so many cases and after long investigation which are years long it finds that there is no violation. However, if we put the bar of preliminary investigation by the Director General, it may use its expertise and then make a wise decision as to whether there exists a case which needs to be inquired into. Also, in *Steel Producers [2014] CCI 3*, if we see under Section 3(3) “shall presume” is used to formulate prima facie opinion by Commission. Now in the present case too if we notice there was question as to the fact that this presumption may affect the Director General and the investigation process further as he may work in this pre-conceived notion.

Under the MRTP Act, the Commission before issuing any process requiring the attendance of the person against whom an inquiry (other than an inquiry upon an application by the Director General) has been initiated under Section 10, by an order require the Director General to make, or cause to be made, a preliminary investigation in such manner as it may direct and submit a report to the Commission to satisfy it as to whether or not the matter requires to be inquired into or not. Thus, under MRTP Act the possibility of conclusion of no violation at a later stage was lower than in the present regime. This saved time of the members of the regulatory body and also of parties.

### **Prioritization of Cases**

To bring efficiency to the existing system, UK’s principle of prioritisation<sup>61</sup> may help in prioritising cases on grounds like risks, effect on consumer, time and resources required. Even

<sup>60</sup>Competition Commission of India Annual Report 2016-2017, [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/CCI\\_AR-2016-17\\_English.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/CCI_AR-2016-17_English.pdf), (Page No. 3) (Last visited Feb. 27, 2021).

<sup>61</sup>Competition and Markets Authority, The United Kingdom, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/885956/prioritisation\\_principles\\_accessible\\_v.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf), (last visited on Feb. 22, 2021).

after decisions are made, periodical assessment of the decisions is done and shared by the members. Like ASEAN<sup>62</sup>, we can adopt their prioritisation principle based on the complexity of cases and investigation, impact on consumer welfare, seriousness of effect on relevant market etc.

To understand the Competition Commission of India's approach towards the Director General, whether it is *de-novo* or deferential, sample of 110 cases was taken, the conclusion of which can be summed up as: in some of the cases, it is noticed that the Director General was asked to conduct further investigation for better analysis of the misconduct. Out of 110 cases, the Competition Commission of India has disagreed fully or in part with the Director General's report in 35 cases. While assessment of relevant market is one crucial factor of determining abuse of dominant position, the Competition Commission of India has disagreed with the Director General's analysis of relevant market in 10/ 49 cases. In most cases we find that if dissent exists, it usually supports the Director General and thus ratifies the Director General's conclusion. In most of the cases, the Competition Commission of India usually agrees with the findings of the Director General and when it does not, the COMPAT has in most of the cases remanded back the matter to the Competition Commission of India for re-consideration.

As we know Director General is the linchpin of the Competition Commission of India as its only with his timely report inquiry can begin. In the Annual Report 2016-2017, the Commission took this defence that the delay is caused due to rising *complexity of issues*, but it is noteworthy that the delay has been there since the very beginning of the cases and thus there are various other reason behind the delay in submission of reports by the Director General which includes lack of coherence on the part of the Competition Commission of India, no preliminary investigation or pre-complaint inquiry as is done in the UK, lack of resources and effective usage of existing resources by proper prioritisation.

To answer whether the Director General is a part of the Competition Commission of India or independent of it, we can sum up the structure of the Competition Commission of India by the Annual Report of 2016-2017, the Commission is said to comprise of 156 posts while the office of the Director General is said to be composed of 41 posts. It has embarked the division based on various categories. The two are said to be distinct and division of staff and professionals is

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<sup>62</sup> Competition enforcement strategy toolkit for ASEAN Competition agencies, [https://asean.org/storage/FINAL-ACRF\\_adopted\\_37th-ASEAN-Summit\\_18122020.pdf](https://asean.org/storage/FINAL-ACRF_adopted_37th-ASEAN-Summit_18122020.pdf), (Page no 15), (last visited on Feb. 22, 2021).

made accordingly. The appointment and promotion of the staff for the two offices is done separately. We cannot really accept the contention that delay is done to avoid discrepancy in judgments, as the aim of the act states consumer welfare which is highly based on the timing of the decision. Time frame is thus of utmost importance. Timely amendments i.e., as was done by 2017 notification to remove the time period of 30 days such time period was coming in way of proper implementation or other measures like notifications and publications should be made as society is advancing continuously.

