

## **SEMESTER-II**

### **LM-104-COMPETITION LAW CREDIT-4**

#### **TOPIC-6: DUTIES OF DIRECTOR GENERAL, COMPETITION ADVOCACY AND PENALTIES**

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## **DIRECTOR GENERAL**

- The Competition Commission have all the functions of investigation adjudication, prohibition and punishment relating to competition law abuses.
- The office of Director General is responsible for investigations under Competition Act 2002 in India.
- The Monopolies and Restrictive Trade Practices Act 1969 established an office of Director-General of Investigation & Registration (DGIR) which became the predecessor for the office of Director General under Competition Act 2002.
- The Director General is appointed by Central Government but reports to the Commission.

### **APPOINTMENT OF DIRECTOR GENERAL [SECTION 16].**

- The Central Government may, by notification, appoint a Director General for the purposes of
  1. Assisting the Competition Commission of India (hereinafter ‘Commission’) in conducting inquiry into contravention of any of the provisions of the Competition Act 2002 (hereinafter ‘Act’) and
  2. For performing such other functions as are, or may be, provided by or under the Act.
- The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy

or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

- Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the **general control, supervision and direction** of the Director General.
- The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.
- The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst
  1. persons of **integrity** and
  2. **outstanding ability** and
  3. who have **experience in investigation**, and
  4. **knowledge** of
    - i. accountancy,
    - ii. management,
    - iii. business,
    - iv. public administration,
    - v. international trade,
    - vi. law or
    - vii. economics and
  5. such other qualifications as may be prescribed.

## **DIRECTOR GENERAL TO INVESTIGATE CONTRAVENTION (SECTION 41).**

- Chapter 5 of the Act deals with the duties of Director General.

- 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.
- The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.
- 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.
- For the purposes of Section 41:
  - a) the words “the Central Government” under section 240 of the Companies Act, 1956 shall be construed as “the Commission”;
  - b) the word “Magistrate” under section 240A of the Companies Act, 1956 shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

## **PENALTIES**

### **SECTION 27: POWER OF COMMISSION TO ISSUE ORDERS AFTER INQUIRY INTO AGREEMENTS OR ABUSE OF DOMINANT POSITION:**

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

**SECTION 27(2):** Impose such penalty, as it may deem fit which shall be not more than **ten percent of the average of the turnover for the last three preceding financial years**, upon each of such person or enterprises which are parties to such agreements or abuse:

**PROVISO:** In case any agreement referred to in section 3 has been entered into by a **cartel**, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to **three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.**

### **SECTION 28: POWER OF COMMISSION TO DIVIDE THE ENTERPRISE ENJOYING DOMINANT POSITION:**

(1) The Commission may by order in writing, **direct division of an enterprise enjoying dominant position** to ensure that such enterprise does not abuse its dominant position.

- Section 31 provides the power of Commission to issue orders on certain combinations
- Section 32 gives the Commission Extra-Territorial Powers.
- The Commission can issue Interim Orders under Section 33.
- **Chapter 6 of the Act deals with the Penalties.**

#### **CONTRAVENTION OF ORDERS OF COMMISSION (SECTION 42):**

- The Commission may cause an inquiry to be made into **compliance** of its orders or directions made in exercise of its powers under the Act.
- If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees **one lakh for each day** during which such non-compliance occurs, subject to a maximum of rupees **ten crore**, as the Commission may determine.
- If any person does not comply with the orders or directions issued, or fails to pay the above fine, he shall, without prejudice to any proceeding under section 39, be punishable with **imprisonment** for a term which may extend to **three years**, or with fine which may extend to rupees **twenty-five crore**, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:
- Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

#### **COMPENSATION IN CASE OF CONTRAVENTION OF ORDERS OF COMMISSION (SECTION 42A).**

- Any person may make an application to the **Appellate Tribunal** for an order for the **recovery of compensation** from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise **violating directions** issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

#### **PENALTY FOR FAILURE TO COMPLY WITH DIRECTIONS OF COMMISSION AND DIRECTOR GENERAL (SECTION 43).**

- If any person fails to comply, without reasonable cause, with a direction given by—
  - (a) the Commission under sub-sections (2) and (4) of section 36; or
  - (b) the Director General while exercising powers referred to in sub-section (2) of section 41,

such person shall be punishable with fine which may extend to rupees **one lakh for each day** during which such failure continues subject to a maximum of rupees **one crore**, as may be determined by the Commission.

#### **POWER TO IMPOSE PENALTY FOR NON-FURNISHING OF INFORMATION ON COMBINATIONS (SECTION 43A)**

- If any person or enterprise who **fails to give notice** to the Commission under Section 6(2), the Commission shall impose on such person or enterprise a penalty which may extend to:

- a) 1% of the total turnover or
  - b) 1% of the assets,
- whichever is **higher**, of such a combination.

#### **PENALTY FOR MAKING FALSE STATEMENT OR OMISSION TO FURNISH MATERIAL INFORMATION (SECTION 44).**

- If any person, being a party to a combination,—
    - (a) makes a statement which is **false** in any material particular, or knowing it to be false; or
    - (b) **omits** to state any material particular knowing it to be material,
- such person shall be liable to a penalty which shall not be less than rupees **fifty lakhs** but which may extend to rupees **one crore**, as may be determined by the Commission.

#### **PENALTY FOR OFFENCES IN RELATION TO FURNISHING OF INFORMATION (SECTION 45).**

- Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under the Act any particulars, documents or any information,—
  - (a) makes any statement or furnishes any document which he knows or has reason to believe to be **false** in any material particular; or
  - (b) **omits** to state any material fact knowing it to be material; or
  - (c) wilfully **alters, suppresses or destroys** any document which is required to be furnished as aforesaid,

such person shall be punishable with fine which may extend to rupees **one crore** as may be determined by the Commission.

- The Commission may also pass such **other order** as it deems fit.

#### **CREDITING SUMS REALISED BY WAY OF PENALTIES TO CONSOLIDATED FUND OF INDIA (SECTION 47).**

- All sums realised by way of penalties under this Act shall be credited to the **Consolidated Fund of India**.

#### **CONTRAVENTION BY COMPANIES (SECTION 48):**

- Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a **company**, every person who, at the time the contravention was committed,
  - was in charge of, and
  - was responsible to the company for the conduct of the business of the company,
  - as well as the company,

shall be **deemed to be guilty** of the contravention and shall be liable to be proceeded against and punished accordingly:

- No person shall be liable if he proves that:
  - a) the contravention was committed **without his knowledge** or
  - b) that he had exercised all **due diligence to prevent** the commission of such contravention.
- Where a contravention of any of the provisions of the Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the **consent or connivance** of, or is attributable to any neglect on the part

of, any **director, manager, secretary or other officer** of the company, such director, manager, secretary or other officer shall also be **deemed to be guilty** of that contravention and shall be liable to be proceeded against and punished accordingly.

Here company means a body corporate and includes a firm or other association of individuals; while director, in relation to a firm, means a partner in the firm.

#### **RELEVANT CASE LAW:**

- *M/s Swastik Stevedores Private Limited vs M/s Dumper Owner's Association & Ors. No. 42/2012 decided on 21/01/2015*

Para 138: Considering the totality of facts and circumstances of the present case as noted above including the mitigating factors as pleaded by the parties, the Commission notes that the mitigating factors were duly accounted for as found necessary in the original order by not imposing the maximum penalty as envisaged under the law. For the reasons stated earlier, the Commission is of opinion that the said factors do not warrant any further reduction in the penalty imposed and accordingly, the Commission upholds the penalty as imposed vide the original order dated 24.02.2012 upon the parties to these remand proceedings except M/s Confidence Petroleum India Ltd.

139. So far as the answering applicant/ party i.e. M/s Confidence Petroleum India Ltd. is concerned, certain peculiar facts may be noticed.

140. It was pointed out that M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd. merged with M/s Confidence Petroleum India Ltd. by an order dated 18.09.2009 of the High Court of Bombay. However, as the BIS, CCOE [Chief Controller of Explosive] and other licenses (pending for change of name) were in the name of M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd., the tenders were filed in their individual names and orders were placed on them but the turnover in their names were included in the turnover of M/s Confidence Petroleum India Ltd. Further, as the appointed date of merger was 01.04.2007, the turnover of the companies i.e. M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipment Pvt. Ltd. are recorded in the books of M/s Confidence Petroleum India Ltd. w.e.f. 01.04.2007 and are consolidated. It was further pointed out that M/s Andhra Cylinders (a unit of M/s Envy Cylinder Pvt. Ltd.) is a 100% subsidiary of M/s Confidence Petroleum India Ltd. and as such the turnover of M/s Andhra Cylinder is taken as the turnover of M/s Confidence Petroleum India Ltd. in the consolidated accounts under the Companies Act, 1956.

141. The grievance of M/s Confidence Petroleum India Ltd. is that turnover of M/s Hans Gas Appliances Pvt. Ltd. was taken twice in as much as it also stood in the turnover of M/s Confidence Petroleum India Ltd. A sheet highlighting the error in computation of turnover in original order has been placed on record alongwith the corrected figures after excluding the duplication. Based upon this, an average turnover of Rs. 1797930363/- has been worked out by the answering applicant/ party i.e. M/s Confidence Petroleum India Ltd. Accordingly, this figure is taken on record and a penalty @ 7% of this average turnover i.e. Rs. 125855125.41 is imposed upon this party.

- ***In Re: Builders Association of India vs Cement Manufacturers' Association and Anr. Case No. 29 of 2010 Decided on:31/08/2016***

Para 294. “It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalty are: (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

301. It is evident that the amount of three times of net profit calculated as above is higher than 10% of average turnover. As per the proviso to Section 27(b) of the Act, the penalty may be determined on the basis of net profit or turnover whichever is higher. In the present case, the Commission takes into account the net profits for computing penalties. For the reasons adumbrated earlier, the Commission hereby imposes a penalty of 0.5 times of the net profits for 2009-10 (from 20.05.2009) and 2010-11 in case of each cement manufacturers named as Opposite Parties in this case” (***the total imposed penalty in this case was 6317.34 Crores***)

- ***In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014 Decided on 18/01/2017***

Para 8.6 “Further, taking into consideration all the relevant factors including the duration of the cartel, the volume of the tender affected by the cartel and the value thereof, the Commission decides to impose penalty on OP 1 and OP 3 calculated at 1.0 times of their profit respectively in the year 2012-13

and on OP 2 at the rate of 3% of its turnover for the year 2012-13.” ***(Total amount INR 29,152,607)***

Para 8.7 Considering that the Commission has decided to grant a **75 percent reduction** in penalty to OP 1 under Section 46 of the Act, as recorded hereinabove, the total amount of penalty to be paid by OP 1 is **Rs. 15,59,159/-**

8.13 As the Commission has already held that the impugned acts/ conduct of OP 1, OP 2 and OP 3 are in contravention of the provisions of Section 3(1) read with Section 3(3)(c) and 3(3)(d) of the Act, the liability of the persons in-charge of OP 1, OP 2 and OP 3 flows vicariously from the provisions of Section 48 of the Act. In the present case, while Shri Sandeep Goyal for OP 1 has accepted that he played an active role in the cartelisation; Shri Ashish Jain for OP 2 and Shri Ramesh Parchani for OP 3 have denied the allegations and have taken bald pleas such as threat from OP 1, absence of knowledge of e-mail, attributing calls to combined procurement of ‘die’, etc. They have not been able to show or bring on record, either before the DG or the Commission, any evidence to absolve themselves from the liability in terms of the provisions of the Act.

Para 8.14 Resultantly, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on Shri Sandeep Goyal for OP 1, Shri Ashish Jain for OP 2 and Shri Ramesh Parchani of OP 3. ***(Total amount INR 345,350)***

**(This case is unique in terms of percentage of reduction and individual penalty)**

## COMPETITION ADVOCACY

- Chapter 7 Section 49 of the Competition Act 2002 deals with Competition Advocacy.
- The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and
- a State Government may, in formulating a policy on competition or on any other matter, as the case may be,
- **make a reference** to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within **sixty days** of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.
- The opinion given by the Commission shall **not be binding** upon the Central Government or the State Government, as the case may be in formulating such policy.
- The Commission shall take suitable measures for the **promotion of competition advocacy**, creating awareness and imparting training about competition issues.