Quick Guide on Dawn Raids and Leniency in India

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DAWN RAIDS AND LENIENCY

1. What are dawn raids?

Dawn raids are unannounced investigations carried out by competition regulators at the official premises or homes of management personnel such as members of the managing committee, executive directors, etc. in order to collect evidence in relation to suspected competition law violations. Under the Competition Act, 2002 (as amended) (**Competition Act**), the Director General (**DG**) or any other person so authorised by the DG (**Inspectors**) are authorised to carry out investigations at an enterprise's premises to investigate violations of the Competition Act.

Dawn raids are conducted as "search and seizure" operations when the Competition Commission of India (**CCI**) has a strong suspicion of antitrust violations. The powers of "search and seizure", in the course of a dawn raid, are exercised on the ground that relevant material (such as, documents, records, mobile phones, computers, servers, tablets etc.) may be destroyed, mutilated, altered, falsified, or secreted by the enterprises under investigation.

2. When and where can dawn raids be conducted?

Dawn raids can be conducted at any time. However, they are typically conducted early in the morning, in order to ensure that enterprises do not have the time or the opportunity to conceal or destroy any incriminating information or documents. Dawn raids can be conducted not only at the official premises but also at private homes and vehicles of company personnel.

3. What are the essential pre-conditions for conducting a dawn raid?

Under the Competition Act, the DG, authorized by way of a search warrant from the Chief Metropolitan Magistrate, New Delhi, can carry out investigations at the official premises or homes of the company personnel. Therefore, any investigation without a search warrant is not permissible.

Further, all the rules which are applicable to such operations under the Code Of Criminal Procedure, 1973, must be followed as well.

4. What is the scope of the power exercised by the DG during a dawn raid?

The DG is empowered to:

- gain access to the premises of the enterprise before, during and after business hours as well as on several consecutive days (including holidays);
- access the homes of personnel;
- access the vehicles of the enterprise and its personnel;
- request the production of specific documents and information relating to the investigation;
- seal any business premises and documents for the duration of the investigation;
- ask questions on the spot and conduct interviews under oath;
- enter any other place where relevant material are kept or may be kept; and
- seize any documents, diaries, calendars, computers, servers, tablets, mobile phones and hard disk drives as evidence.

5. Are the Inspectors subject to any restrictions?

Investigation is only permissible pursuant to a search warrant, where the Inspectors have a specific initial suspicion of a competition law infringement. The search warrant, unless being issued for a general search, must clearly identify the document or other things for which the investigation is to take place and the premise to which the search is to be confined. Further, the search warrant should clearly provide the Inspectors with the power to "seize" evidence.

6. What are the rights of the enterprise when confronted with a dawn raid?

In the event of a dawn raid, the enterprise can exercise the following rights:

- contact legal counsel before the commencement of the operation;
- ask for authorization documents (including the investigation order and the warrant) to ascertain the scope of the dawn raid;
- keep a record of all the questions asked and material copied/seized by the Inspectors;
- object to the power exercised by the Inspectors beyond the scope of the dawn raid; and
- identify and appoint a sufficient number of persons (for example, members of the legal team) to act as "shadows" to accompany the Inspectors and make a contemporaneous note of the investigation.

7. What steps should be taken by the enterprise at the arrival of the Inspectors?

Upon arrival of the Inspectors, immediately consult the enterprise's dawn raid compliance manual. If not available, immediately inform the compliance manager, legal advisors, the senior management and the corporate communications department to plan a relevant strategy in response to the queries raised by the Inspectors. If the Inspectors insist upon initiation of the investigation immediately, the enterprise's representative should not impede them in any manner.

8. What are the obligations of the enterprise during the unannounced raid?

The enterprise is obliged to:

- furnish all the documents, explanation and answers falling under the scope of investigation;

- not to tamper or break the official seals;
- answer the Inspectors' questions effectively;
- provide documents specifically requested, irrespective of where they are stored, or make them otherwise available; and
- co-operate with the Inspectors in the event of any irreconcilable conflict and subsequently record its protest with the DG.

9. What are the obligations of an enterprise post the unannounced raid?

The enterprise should:

- keep a record of the source/location of the copied documents. Subsequently, it may be desirable to review the whole file in context since the Inspectors may copy only part of a file that may be perceived as damaging;
- mark confidential documents as such, when copied. This is particularly important once copies of documents leave the enterprise's premises and are in the custody of the Inspector; and
- make duplicate copies or print-outs of the documents copied by the Inspectors for the enterprise's files.

10. What approach should be followed at the end of the investigation?

- The Inspectors should be asked specifically whether the investigation has been concluded. If no confirmation of this is forthcoming, it should be assumed that the investigation will continue the next day.
- If the Inspectors have sealed any part of the premises, these seals should not be removed until such time as the Inspectors have confirmed that the investigation is over. In case the Inspectors do not return at the start of business on the next day, legal help should be sought.

- Members of staff should be made aware that the Inspectors can return later to carry out further investigations at any time.

11. What can the Inspectors take away?

The Inspectors may make copies of the documents that have been viewed and identified as relevant. Data files must be printed out or, after checking their relevance, be copied onto data carriers. However, the search warrant should clearly provide the Inspectors with the power to seize evidence.

12. Is it possible to insist that a lawyer is present throughout the search?

Ideally, the investigation should not commence without the presence of legal counsel. If there is no legal counsel on the premises, then, the enterprise should request the Inspectors to wait until one arrives. However, there is no obligation on the Inspectors to wait for legal counsel to arrive and they may commence the investigation.

13. Is communication between a client and its lawyers recognised as privileged and confidential information?

All communication exchanged between a client and its lawyers, in the course of the provision of legal services by the lawyers, are statutorily recognised as privileged and confidential information. On the other hand, correspondence with in-house counsel is typically not considered as privileged in India. At present, there is limited clarity as to the manner in which the Inspectors and the DG will treat such information, obtained during a dawn raid.

14. Who can be interrogated by the Inspectors?

During an investigation, Inspectors may examine on oath, members of staff and management (for example, directors or managers including the officers, employees and agents of the enterprise) for explanations regarding facts and documents.

15. What recourse is there if the Inspectors go beyond their power during the raid?

In case the Inspectors exceed their authority, a written complaint (protest) should be promptly recorded with the DG and after consultation with the legal counsel, the investigation may be challenged in a court of law by the enterprise. This could safeguard personnel against allegations of non-cooperation with the Inspectors during the investigation.

16. What are the penalties for not complying with the Inspectors during investigation?

- Producing documents or information with knowledge or belief that the same is false on a material particular, omission with regard to a material particular or suppression, alteration or destruction of any document is punishable with fine which may extend to INR 1 crore (approximately USD 148,300.3 / EUR 139,749.2 / GBP 116,944.03 / JPY 17,120,685.5).
- Failure to comply with directions given by the DG or CCI, without reasonable cause, is punishable with fine which may extend to INR 1 lakh (approximately USD 1,480.6 / EUR 1,395 / GBP 1,164.2 / JPY 170,675.5) for each day during which such failure continues subject to a maximum of INR 1 crore (approximately USD 148,300.3 / EUR 139,749.2 / GBP 116,944.03 / JPY 17,120,685.5).
- Failure to produce documents, furnish information, appear or answer questions or sign notes of examinations may lead to imprisonment which may extend to 6 months or fine which may extend to INR 20,000 (approximately USD 296.6 / EUR 279.5 / GBP 233.9 / JPY 34,267.3) or both. A fine of INR 2,000 (approximately USD 29.6 / EUR 27.9 / GBP 23.3 / JPY 3,413.6) per day may also be ordered, for any continuing refusal or failure.

17. Have there been any dawn raids in India?

To date, the DG has conducted two dawn raids – one in September, 2014 and the other in August, 2016. While the first raid was in a case involving an investigation regarding abuse of dominance, the second raid is understood to be in relation to a cartel investigation.

18. What are the steps to be taken by an enterprise to prepare its personnel for a dawn raid?

An enterprise confronted with a dawn raid must ensure that the interest of the enterprise and its personnel are protected and thus, it is crucial to have a comprehensive compliance program in place in order to deal with the same in a proactive manner. Further, it would also ensure that the reputation of the enterprise and its legal position are fully safeguarded as a dawn raid may be followed by stringent fines and sanctions. The following steps must be undertaken to prepare for a dawn raid;

(a) maintain guidelines to be followed by the personnel during a dawn raid;

(b) ensure that these guidelines are read by all the personnel and a copy is provided to them for ready reference;

(c) ensure that the personnel sign an affidavit stating that they have read and understood the guidelines;

(d) a copy of the guidelines should be kept at the residence of senior management and in-house legal counsel for ready reference;

(e) ensure that the IT staff receives dedicated dawn raid training and guidelines;

(f) ensure that the security staff and the receptionists are trained to deal with the inspections at their arrival;

(g) appoint someone to act as a "responsible spokesperson" and ensure that they are well-versed with the requirements of such a role; and

(h) appoint someone to act as a "coordinator" and ensure that they are well-versed with the requirements of such a role.

19. Has there been any instance where competition regulators from different jurisdictions have coordinated to conduct cross-border dawn raids?

While the CCI has not yet participated in a multi-jurisdictional dawn raid, it has entered into memoranda of understanding with several competition authorities (i.e., BRICS, the European Union, the United States of America, Canada and Australia) and it is likely that the CCI may participate in multi-jurisdictional dawn raids in the near future.

20. Does the Indian competition regime provide for a leniency programme?

Yes, the Competition Act Provides for a leniency programme which provides for reduced penalties to be granted to the applicants who make vital disclosures on cartel activity. The term "vital disclosure" of information means full and true disclosure of information or evidence which would be sufficient to enable the CCI to form a *prima facie* opinion in relation to the existence of a cartel.

21. What are the benefits of applying for leniency?

The leniency program in India provides for a marker system wherein "priority status" is granted to leniency applicants resulting in a reduction in the quantum of penalty leviable on them.

The CCI is empowered to grant up to 100 per cent. reduction in fines, i.e., complete immunity, to the applicant who is the first to make "vital disclosure" to the CCI. Subsequent leniency applicants, who disclose evidence that provides "significant added value" to the evidence already in possession with the CCI or the DG, may also be granted leniency. The CCI can grant an applicant which is marked as second priority, a reduction in penalty of up to 50 per cent., whereas an applicant marked as third priority, can be granted a reduction in penalty of up to 30 per cent.

22. What is the nature and extent of information required to be disclosed? Does the leniency regime provide for confidential treatment of the leniency application?

The leniency applicant is required to make "vital disclosure" of information. It refers to full and true disclosure of information or evidence which would be sufficient to enable the CCI to form a *prima facie* opinion in relation to the existence of a cartel. Such information should either enable the CCI to form a *prima facie* opinion of the existence of the cartel or establish contravention of Section 3 of the Competition Act in a matter under investigation by the DG.

The enterprise seeking leniency is also required to cease participation in the cartel and fully co-operate with the CCI. Such co-operation is required throughout the investigation and other proceedings before the CCI. The obligation to co-operate with the CCI includes (a) responding to the information requests from the CCI and the DG; (b) promptly submitting any additional information that comes to the applicant's knowledge in relation to the cartel; (c) not concealing, destroying or manipulating any document or information; and (d) providing access to the current and former personnel involved in the cartel.

The CCI treats the identity and all information received from the leniency applicant as confidential. However, the CCI may subsequently, during the investigation process, require the applicant to waive confidentiality over relevant evidence to enable it to approach other cartel participants. The CCI can make a disclosure only if (a) such a disclosure is made by the consent of the applicant; (b) the disclosure is required by law; or (c) the applicant has already made public disclosure of such information.

23. What is the process for filing a leniency application with the CCI?

(a) The leniency applicant or its authorized representative is required to make an application to the Secretary, CCI setting out certain details such as, names of the cartel

members, the duration of the cartel in India, a brief description of the cartel arrangement, goods involved and the geographic market in India, etc.

(b) In the event, the applicant is not the first to approach the CCI, the applicant will be required to provide information with "significant added value" to the evidence already in the possession of the DG in order to enhance the ability of the CCI to establish the existence of a cartel.

(c) The Secretary is required to place the matter before the members of the CCI within a period of three working days from the date of submission of the information by the leniency applicant. In this regard, the CCI is required to mark the status of the leniency applicant which will be communicated by the Secretary.

24. Have there been any successful leniency applications in India?

Given that the Indian competition law regime is at a nascent stage, while there have been several leniency applications, most of these applications are at the investigation stage and there has been no final order of the CCI granting immunity or a reduction in the quantum of penalty in relation to such applications.

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