



cyril amarchand mangaldas
ahead of the curve

Cartels and the Leniency Program in India

Dawn Raids



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A Thought Leadership Publication

We now present this guide to enable readers to have an overview of the systems and legal rules and regulations that are essential for business operations in India.

Content

A	Procedure - Limitations on the DG's power of search and seizure	06
----------	------------------------------------------------------------------------	-----------

B	During a 'Dawn' Raid	07
----------	-----------------------------	-----------

C	After the 'Dawn' Raid	08
----------	------------------------------	-----------

D	Lawyer – Client Privilege & Dawn Raids	09
----------	---------------------------------------------------	-----------

E	Penalties for not Complying during Investigation	10
----------	---------------------------------------------------------	-----------

F	Indian & Global Dawn Raids	11
----------	---------------------------------------	-----------

Dawn Raids

The Competition Act, 2002 (**Act**) empowers the Director General (**DG**), Competition Commission of India (**CCI** or **Commission**) – the investigate arm of the CCI – to conduct dawn raids, which are unannounced inspections at the official premises of enterprises, or homes of management personnel to investigate violations of the Act.

THE WHAT, WHY, HOW AND WHEN

- ▮ **What?** - Dawn raids are conducted as “search and seizure” operations when the CCI suspects antitrust violations.
- ▮ **Why?** - The objective of a “dawn raid” is to collect incriminating information in documents, records, mobile phones, computers, servers, etc., The DG generally conducts dawn raids when the CCI strongly suspects antitrust violations and the fact that evidence may be withheld or destroyed during the investigation.
- ▮ **How?** - The DG has broad powers while conducting a raid, and may search and seize books and papers (including electronic data residing on hard drives and other electronic devices); homes and cars of personnel; request the production of specific documents and information related to the investigation; seal business premises or documents for the duration of the search and conduct interviews under oath.
- ▮ **When?** - ‘Dawn’ raids may be conducted at any time of the day, including weekends and holidays, when businesses are likely to be least prepared. Generally, they are conducted early in the morning to ensure that enterprises do not have the time or the opportunity to conceal or destroy incriminating information or documents.

A

Procedure - Limitations on the DG's power of search and seizure

SNEAK PEEK

- ⌞ Requirement of a search warrant from the Chief Metropolitan Magistrate, New Delhi.
- ⌞ Two “independent and respectable” witnesses.
- ⌞ Requirement to record the details of the witnesses and their signature on the final written inventory of items that are seized.

To be able to conduct a dawn raid, the **DG must** first obtain a search warrant that is duly issued by the Chief Metropolitan Magistrate, New Delhi. 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 premises on which the search is to be conducted. The search warrant must also clearly provide the DG with the power to “seize” evidence.

Two “independent and respectable” witnesses must accompany the DG during the raid. An “independent and respectable” witness is generally any third party that is not interested or affected by the dawn raid. Despite the law requiring that witnesses be from the locality of the premises that is being raided, Indian judicial precedents have relaxed this requirement. However, it is the DG's statutory duty to record the details of the witnesses and their signatures on the final written inventory of items that are seized. A copy of the inventory, along with the witnesses' signatures is statutorily required to be delivered to the occupant whose premises is being raided.

B

During a ‘Dawn’ Raid

SNEAK PEEK

- ⌞ Enterprise must immediately inform senior management and internal/external legal teams.
- ⌞ No statutory right for the lawyers to be present during a raid. However, parties may request the DG to commence the search after its legal counsel arrives.
- ⌞ Waiting period should be used to review the investigator’s identify proof, warrant and scope of the investigation.
- ⌞ Enterprise should assign key members to “shadow” the investigators.
- ⌞ Enterprise must extend its full co-operation to the investigators, but need not volunteer information.
- ⌞ There is no right to legal counsel during questioning by the investigator. However, a request may be made to the DG.
- ⌞ Enterprise should not make any external communication to any third party about the dawn raid.
- ⌞ At the end of the investigation, the DG will provide a signed copy of the documents/electronic devices seized as well as the employees interviewed.

There is no statutory right for a lawyer to be present during a dawn raid. It is unlikely that the investigators will wait for a lawyer prior to commencing their search. However, there is nothing that prohibits a lawyer from being present, and it is advisable that the enterprise politely requests the DG to wait until its legal counsel arrives.

During a dawn raid, it is recommended that enterprises assign key members to monitor investigators while they conduct the search. These persons should be “shadows” and take careful written notes of the investigators’ actions, but not interfere with the raid. The enterprise should assist the investigators in copying documents or information. Investigators must not be left alone and access to legally privileged documents or documents unrelated to the investigation as specified in the warrant should not be allowed.

The enterprise should extend full, truthful and prompt co-operation to the investigators and answer requests related to information, personnel etc. However, information need not be volunteered, and it is recommended that the employees do not answer any leading questions that the investigators may pose.

Individuals **must not** sign anything at the investigator’s request without legal advice.

C

After the ‘Dawn’ Raid

SNEAK PEEK

- ⌞ An internal meeting or de-briefing should be held to discuss the following points:
 - Scope of the investigation, implications and any follow-up actions required to be taken.
 - Documents, files, information, etc. that have been seized and copies of such documents have been made.
 - Persons who have been interviewed, the questions asked by the DG Officials and the responses provided.
 - Summaries of the appointed “shadows” are collected and collated.
- ⌞ If false or incorrect information has been provided, the enterprise must rectify this immediately.
- ⌞ Suitable preparations must be made to inform shareholders and to address any possible leak of the news of a dawn raid.

It is essential that the enterprise keeps a record of all documents the investigators have seized or copied, along with a record of all statements of its employees’ interview sessions with the investigators. In this process, if the enterprise identifies that any false or wrong information has been provided to the investigators, then this has to be rectified at the earliest.

Using the notes of the employees who “shadowed” the investigators, the enterprise must prepare a legally privileged report for its external lawyers and seek advice. Additionally, the enterprise must prepare suitable communication to keep its shareholders and employees informed, and prepare its public relations department for the possibility that the news of a dawn raid may leak.

After the dawn raid, there is also a possibility of the DG requesting additional documents and information.

D

Lawyer – Client Privilege & Dawn Raids

SNEAK PEEK

- ▮ The Indian Evidence Act, 1872 (**Evidence Act**) protects confidential communications between a client and their legal professional advisers.
- ▮ An enterprise may try to demonstrate to the investigators the privileged nature of a document, or alternatively file oral and written protests should the DG peruse and seize legally privileged information.

Under the Evidence Act, any confidential communication with a legal professional adviser (who is qualified to give legal advice) is protected, and need not be disclosed. Such communications can include documents that come into existence for the purpose of seeking legal advice, or in relation to an anticipated or ongoing litigation.¹ Further, in India, communications with inhouse legal counsel may be considered as legally privileged, as long as such communications pertain to questions of law and relate to litigation.²

Practically, the DG determines the relevance of information or documents and it may be difficult to stop investigators from looking at, or even seizing legally privileged documents. However, individuals may request to review a document, if they believe it to be legally privileged and demonstrate to the investigator that it is privileged. Alternatively, oral and written protests should be registered with the DG, and the enterprise must contact its lawyers immediately for suitable advice.

¹ *Larsen and Toubro Limited v. Prime Displays Private Limited*, 2002(5) BomC R158.

² *Municipal Corporation of Greater Bombay & Ors. v. Vijay Metal Works*, AIR 1982 Bom 6 at para 4.²*Municipal Corporation of Greater Bombay & Ors. v. Vijay Metal Works*, AIR 1982 Bom 6 at para 4.

E

Penalties for not Complying during Investigation

NATURE OF FINE	QUANTUM OF FINE
<ul style="list-style-type: none"> ⌞ Producing documents or information with knowledge that it is false on a material particular; ⌞ Commission of a material particular; ⌞ Suppression, alteration or destruction of any document 	<p>INR 1 Crore</p> <p>[approx. USD 0.14 million; Euro 0.11 million; GBP 0.09 million; JPY 14 million]</p>
<ul style="list-style-type: none"> ⌞ Directions of the DG or CCI are not complied with without any reasonable cause 	<p>INR 1 Lakh</p> <p>[approx. USD 1,365; Euro 1,133; GBP 1,000; JPY 144,096]</p>
<ul style="list-style-type: none"> ⌞ Failure to produce documents, furnish information, appear or answer questions or sign notes of examinations 	<p>INR 20,000 or up to 6 months imprisonment</p> <p>[approx. USD 273; Euro 227; GBP 200; JPY 28,819]</p>

A fine of INR 1 crore (approx. USD 0.14 million) may be imposed for producing documents or information with knowledge that it is false on a material particular; omission of a material particular; suppression, alteration or destruction of any document or information.

If the directions of the DG or CCI are not complied with without any reasonable cause, a fine of INR 1 lakh (approx. USD 1,365) may be imposed.

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 (approx. USD 273).

F

Indian & Global Dawn Raids

SNEAK PEEK

- ▮ The CCI has conducted seven dawn raids so far.
- ▮ Under Section 32 read with Section 18 of the Competition Act, and in accordance with several memorandum of understandings (**MOUs**) with foreign competition authorities, the CCI can conduct global dawn raids to crack down on cartels.

A snapshot of the raids conducted by the CCI–

1. In September 2014, the CCI conducted its first raid in relation allegations of an abuse of dominant position at the offices of JCB India Limited.
2. In August 2016, the CCI conducted a simultaneous raid on the premises of Eveready Industries Limited, Indo National Limited, and Panasonic Energy India Co. Limited, in relation to allegations of a cartel.
3. In October 2018, raids were conducted at the premises of Anheuser-Busch InBev, Carlsberg India Private Limited and United Breweries Limited. Following the raid, Carlsberg India Private Limited and United Breweries Limited filed pleas under the CCI’s leniency programme by submitting evidence and agreeing to cooperate.
4. In March 2019, Glencore India, Export Trading Group and Edelweiss Financial Services Limited were raided after the Ministry of Finance reported that they found collusion to artificially inflate dal prices during a drought.
5. In July 2019, the Indian arm of the French company, Mersen SA along with the Hyderabad and Kolkata offices of Assam Carbon Products Limited were raided based on allegations that the parties fixed prices of equipment supplied to the Indian Railways.
6. In September 2019, Climax Synthetics Private Limited, Shivalik Agro Poly Products Limited, Arun Manufacturing Services Private Limited and Bag Poly International Limited were raided for allegedly colluding to rig bids for tarpaulin sold to the Food Corporation of India, wherein the raid was conducted across five cities.
7. In December 2020, the CCI conducted raids at the offices of cement manufacturers, Ultratech Cement Limited, Ambuja Cements Limited, ACC Limited, Shree Cements Limited to investigate the allegation of cartelization.

Additionally, Section 32 of the Competition Act covers anticompetitive conduct taking place outside India, and having an effect on competition in India. To conduct investigations outside India, there is an enabling provision under Section 18 of the Competition Act for the CCI to enter into MOUs with other competition authorities around the world to cooperate during investigations.

The CCI has signed MOUs with the US Department of Justice and the US Federal Trade Commission, European Commission, Canadian Competition Bureau, Australian Competition and Consumer Commission and the Russian Federal Anti-Monopoly Service. Additionally, an MOU was also entered between the competition authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (BRICS countries). To that extent, simultaneous global dawn raids may also be conducted to crack down on cartels in multiple countries. Such raids have already been conducted by Asian, EU and US competition authorities while investigating possible price-fixing amongst air cargo carriers.

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