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ahead of the curve

Cartels and the Leniency Program in India

Cheat Sheet



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A Thought Leadership Publication

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

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OVERVIEW

Section 3 of the Competition Act, 2002 (as amended) (**Competition Act or Act**) prohibits anticompetitive agreements that cause or are likely to cause an appreciable adverse effect (AAEC) on competition in India. Section 3 of the Act became effective on 20th May 2009.

The Competition Commission of India (**CCI or Commission**) is empowered to impose “lesser penalties” on persons who make a full, true and vital disclosure with respect to their involvement in a cartel if the applicant for lesser penalty (or **leniency**) complies with certain other conditions.

The CCI (Lesser Penalty) Regulations, 2009 (**LPR**) were notified on 13th August 2009. The LPR lays down the procedure for claiming leniency. Section 3 read with Section 46 and the LPR is the complete code for the leniency (or lesser penalty) regime in India.

The CCI also has extensive powers of search and seizure that allow it to “raid” the premises and systems of persons suspected to be involved in anti-competitive conduct.

The CCI has ruled on multiple leniency cases (including one that involved a ‘raid’ by the CCI of battery/torch manufacturers), bringing about significant coherence to the rules for leniency or lesser penalty.

This document captures the salient features regarding cartels and the leniency program in India.



Cartels

- ▮ **Agreements** between **competitors** aimed at fixing prices, limiting production or supply, bid-rigging, or collusive bidding. These arrangements are **presumed** to have an AAEC in India and are void.
- ▮ The maximum penalty which may be imposed for cartel arrangements is up to the **higher of three times the profit or 10% of the relevant turnover** for each year of continuation of the cartel.
- ▮ Monetary penalties are also imposed on individuals who have participated in the functioning of the cartel. The Competition Act does not prescribe criminal penalties for anti-competitive conduct.
- ▮ The CCI **need not** establish a case “beyond reasonable doubt”. It is usual for the CCI to use **circumstantial evidence alone** to find a contravention of the Act. The standard of proof for cartel cases, is a *preponderance of probability*. In recent times however, the Office of the Director General (**DG**) relies increasingly on direct evidence from leniency applicants.
- ▮ Joint ventures between actual or potential competitors are **exempt** from Section 3 of the Competition Act, if they lead to efficiencies.
- ▮ The CCI has jurisdiction over anticompetitive conduct **outside India**, if such conduct causes or is likely to cause AAEC in India.
- ▮ During its inquiry or until an order is passed, the CCI may **temporarily restrain** parties from engaging in anticompetitive conduct. While imposing a temporary restraint, the CCI must record that there is a **clear** contravention of the Act that has been, continues to be, or is about to be committed, such that it is of a higher degree than necessary for forming a prima facie opinion. The CCI must also record that it is necessary to issue a restraint, failing which the opposite party will face irreparable harm, or there is a definite apprehension of AAEC in the market.

A. Understanding Cartels

Cartels are **horizontal agreements that involve fixing** prices, discounts, areas of operation, or customers; **limiting** technological innovation, production, or supply; and **bid-rigging** or **collusive bidding**. Cartels are presumed to cause an AAEC in India and are void.

B. Penalties

Monetary penalties may be imposed on enterprises, including individuals involved in a cartel. The penalties may be **up to the higher** of three times the profit or 10% of the turnover **for each year of the continuation** of the cartel.

In May 2016, the Supreme Court of India clarified that the “relevant turnover” and not the “total turnover” of an enterprise should be taken into consideration, when imposing penalties on contravening enterprises. The Supreme Court held that, *“the penalty cannot be disproportionate and it should not lead to shocking results” and that relevant turnover will be, “more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties”*. The Supreme Court further clarified that “Relevant turnover” refers to the *“entity’s turnover pertaining to products and services that have been affected by such contravention”*.¹

Section 48 of the Competition Act allows the Commission to penalize individuals who are responsible for the conduct of the contravening enterprise. The maximum penalty payable by individuals is 10% of the average income of the individual during the preceding 3 financial years.²

The Competition Act **does not** provide for any criminal liability or penalties on contravening enterprises or individuals.

C. Standard of Proof

There is a clear legal presumption of AAEC for anticompetitive horizontal agreements under Indian competition law.

“Preponderance of probabilities” is the standard of proof in cartel cases. Since there are no criminal penalties under the Competition Act, the Director General does not need to establish its case “beyond reasonable doubt”.

However, increasingly, the CCI relies on direct evidence to conclude the existence of anticompetitive cartel arrangements. It would be fair to state that the lesser penalty / leniency program of the CCI has taken off to a good start with many enterprises opting to cooperate with the investigation after it has begun. This is in addition to the class of investigations that are triggered because of a leniency application. Please refer to Section II for a discussion on the lesser penalty / leniency regime in India.

¹ Excel Crop Care Limited v. CCI & Another Civil Appeal No. 2480 of 2014.

² Maruti & Company v Karnataka Chemists and Druggists Association & Ors., Case No. 71 of 2013; In Re: Bengal Chemist and Druggist Association, Suo Motu Case No. 2 of 2012; and Arora Medical Hall, Ferozpur v Chemists and Druggists Association, Ferozpur, Case No. 60 of 2012.

D. Joint Ventures, as an exception to anticompetitive horizontal arrangements

The Competition Act exempts joint venture agreements between actual or potential competitors, **if** the parties can prove that the arrangement would result in efficiencies in the production, supply, distribution, storage, acquisition or control of goods and services.

It is imperative however, that competing enterprises be cautious of the nature of commercially sensitive information exchanged between them. In practice, competing enterprises must establish a “clean team” of members who have no existing responsibility for setting price, terms of sale, or marketing strategy for competing products. A clean team could be constituted of employees from the parties’ finance department or third party consultants. They may be subject to a certain cool-off period after the completion of their duties as part of the clean team, and before becoming involved with decisions and strategies on pricing or marketing. The commercially sensitive information received by clean teams must be sufficiently summarized and aggregated, prior to circulating the information to the business / commercial team within their respective organizations.

The principle of “clean teams” has been somewhat affirmed by the CCI in its approval of the joint venture between three shipping corporations. The CCI accepted the parties’ voluntary commitments to ensure that there was no exchange of commercially sensitive information in relation to the respective non-integrated businesses of the combining enterprises.³

E. Extraterritorial Jurisdiction & Power to Temporarily Restrain Parties

Section 32 of the Competition Act is premised on the “effects doctrine”, and vests the Commission with the power to inquire into any anti-competitive conduct or agreement entered into outside India or executed between foreign parties that causes or is likely to cause an AAEC in India.

Section 33 of the Competition Act allows the CCI to temporarily restrain an enterprise under inquiry from engaging in anti-competitive conduct, until the conclusion of the inquiry, or further orders of the CCI.

However, prior to ordering a temporary restraint, the CCI must record that (i) an act of contravention of the Act has been, or is about to be committed, such that the act is viewed at a much higher degree than the mere formation of a prima facie case under Section 26(1) of the Act; (ii) it is necessary to issue and order a temporary restraint; and (iii) there is every likelihood that the other party would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have an AAEC in India.⁴

³ Combination Registration No. C-2016/11/459.

⁴ CCI v Steel Authority of India Ltd and Another, Civil Appeal No. 7779 of 2010.



The Leniency Regime

The Indian leniency regime is governed by Section 46 of the Competition Act and the LPR, which permits any enterprise or individual who is or was a member of a cartel to apply for leniency. The Commission may grant a penalty reduction of **up to 100%** to the first leniency applicant. The second leniency applicant may be granted a reduction in penalty of **up to 50%**, and subsequent applicant(s) may be awarded a penalty reduction of **up to 30%**.

A. Application to the CCI

- ⌞ Once parties determine that they are part of a cartel they must file a marker application with the CCI's Secretary either orally, or through email or fax. A recent amendment to the regulations clarifies that an application for leniency can also be presented by individuals.
- ⌞ The CCI's Secretary has 5 working days to place the marker application before the Commission. Subsequently, the applicant is granted an appropriate priority status.
- ⌞ The CCI's secretary acknowledges and communicates the priority status to an applicant through telephone, email or fax. The priority status does not mention the rank of an applicant and only records the date and time of receipt of the application.
- ⌞ The applicant must file a detailed leniency application with the CCI within 15 days from the receipt of acknowledgement of its priority status. The leniency application must contain all relevant information and evidence regarding cartel activity.
- ⌞ If the leniency application is not filed within the 15 day period, or such other time as may be granted by the CCI, then the applicant will lose its priority status and benefit under the leniency regime.
- ⌞ The major factors considered by the CCI in reducing the potential fines are: the order of priority i.e., the sequence in which the parties filed their application, the quality of evidence submitted by the parties, and the cooperation of the parties during the investigation proceedings.

The Indian leniency regime provides for a marker system, wherein “priority status” is granted to leniency applicants based on the time at which their application is submitted to the CCI.

Once parties determine that they were or are part of a cartel, the parties must file a “marker application” with the CCI's Secretary either orally, or through email or fax. The Secretary has 5 working days to place this before the CCI, after which the CCI grants the applicant an appropriate priority status. This priority status is acknowledged by the CCI and communicated

to the applicant. However, the priority status **does not** mention the rank of an applicant inter-se other leniency applicants and only records the date and time of receipt of the marker along with any directions that the CCI may like to issue to the applicant.

The applicant **must submit** a detailed written leniency application **within 15 days** from the date of receipt of the CCI's acknowledgement of the marker. The detailed leniency application should contain all the relevant information and evidence regarding cartel activity. If the applicant does not file the leniency application within this 15 day period, or during an extended period granted by the Commission, the applicant will forfeit its priority status and the benefit of leniency. Under the Indian leniency regime, the mere granting of priority status to an application does not entitle an applicant to lesser penalties. A **reduction in the penalty** is determined by the Commission basis an applicant's priority status, the nature (value) of the applicants' (enterprise or individual) information disclosed, and the applicants' cooperation with the CCI.

B. Contents of a Leniency Application

- ⌞ The leniency application must include details of all the members of the cartels; the cartel's objective; the *modus operandi* of the cartel; a description of the product or service in relation to which the cartel was formed and the geographic coverage of the product and cartel; the duration of the cartel; any communications and meetings between cartel members; and any other information requested by the CCI.

The contents to be included in a leniency application should include:

- ⌞ The details of the applicant claiming leniency along with the details of all the members of the cartel such as names, contact details, designations and affiliations of all the cartel participants;
- ⌞ The *modus operandi* of the cartel: a detailed description of the cartel's functioning, the objectives of the cartel and how they were achieved, and a detailed description or list of activities, roles and functions of each participant;
- ⌞ A description of the products or services that were cartelised, and the geographic coverage of the anticompetitive conduct.
- ⌞ The duration of the cartel, the volume of business affected, and the leader/coordinator of the cartel;
- ⌞ A list of meetings between the cartel members, venues, dates and times of such meetings, details of attendees, the agenda, details of discussions and decisions at each meeting, and any ancillary documents or details such as hotel or flight bookings that lend evidentiary support to the Director General's investigation;

- ▮ Relevant communications between cartel members through emails, text messages (SMS), WhatsApp etc.; and
- ▮ Any other information as required by the CCI.

C. Confidentiality

- ▮ The information, documents, and evidence filed *vide* a leniency application is **confidential** under the Competition Act and LPR.
- ▮ During the course of the investigation, the DG or CCI may request the parties to waive confidentiality on relevant information to be able to present to the other respondents.
- ▮ The DG may disclose confidential contents of a leniency application, if the applicant **consents** to the disclosure in writing; or the disclosure is **required** by law; or the applicant has made a **public disclosure** of the information
- ▮ The DG may disclose information in the leniency application, **without** the applicants' consent, only after recording reasons in writing for such disclosure, and the CCI's prior approval to such disclosure.
- ▮ Inspection and access to records is not allowed till such time as the DG's report is not submitted to the CCI. However, parties may request *vide* a written application to the CCI to inspect documents on record that (i) have not been claimed as confidential under the General Regulations; or (ii) are not internal documents.

Under the Competition Act and the LPR all information filed *vide* a leniency application is confidential. However, during the course of the DG's investigation, the CCI may require leniency applicants to waive confidentiality over relevant evidence that the DG may like to confront the other respondents with.

It is usual to receive a request from the DG asking the leniency applicant to 'respond as if it were not an applicant'. The DG may do this to protect the confidentiality of those portions of the leniency application that need not be disclosed to the other respondents.

Respondents to the DG's investigation do not have the right to inspect the records available with the DG till such time as the DG's report is not submitted to the CCI. However, in accordance with Regulation 37 of the Competition Commission of India (General) Regulations, 2009 (**General Regulations**), parties to proceedings may submit a written application to the Secretary of the Commission to inspect or obtain copies of documents or records that were submitted during proceedings for a fee. This request for inspection, however, the CCI allows the parties making such an application to examine only such information which are not confidential or proprietary to safeguard confidentiality.

Persons not party to proceedings may be allowed to inspect documents, if they can demonstrate sufficient cause to the Commission.

In cases where the CCI permits an inspection of documents, such an inspection will be allowed **only** in the presence of an officer authorised by the Secretary of the Commission.

D. Obligations of a Leniency Applicant

- ⌋ After submitting the leniency application, the applicant must cease its participation in the cartel (unless the CCI instructs otherwise); provide vital disclosure of all cartel related information; disclose relevant documents, information and evidence; ensure continuous co-operation with the CCI or DG; and not conceal, destroy, remove or manipulate relevant information.
- ⌋ The CCI may impose additional restrictions depending on the circumstances of each case.
- ⌋ If the leniency applicant does not comply with its obligations, the CCI may revoke the leniency benefit granted to the applicant.

The CCI may instruct the leniency applicant to continue to be marked on communications from the other cartel participants to aid the DG's investigation.

Depending on the circumstances in each case, the Commission may choose to impose additional restrictions or conditions that the applicants must comply with. Under the Competition Act and the LPR, leniency is a **conditional benefit**. That is, the CCI is empowered to revoke the leniency benefit granted to applicants, if the Commission is satisfied that the applicants were in violation of their obligations. In such cases the applicant would be penalised as though a lesser penalty had not been imposed.

E. Evaluation of Leniency Applications

- ⌋ Leniency applications are evaluated by the CCI based on whether (i) the application enables the CCI to commence an investigation; or (ii) applicants file for leniency and cooperate during an ongoing investigation.
- ⌋ If there is an ongoing investigation, the CCI also evaluates the lapsed time between the commencement of the investigation and the timing of the leniency application.
- ⌋ Any reduction in penalty is determined basis the priority status awarded to an applicant, the quality of information disclosed, evidence that is already on record with the DG prior to the application being filed, and the applicant's cooperation with the DG.
- ⌋ The CCI passed its first leniency order in January 2017.
- ⌋ It is possible for more than one applicant to claim the 'third priority status'.

The CCI evaluates a leniency application by assessing whether such an application enables the Commission to commence an investigation, or whether applicants cooperate with an ongoing investigation and file for leniency by disclosing other material information and evidence. There is precedent to show that leniency applications filed after the company's premises were raided are not redundant, and may qualify for reduced fines, although these reductions are significantly lower than what the parties would have received had they filed sooner.

In at least one case, more than a single applicant were allowed 'third priority' benefits of a reduced fine. The CCI has also refused lesser penalty benefit to an applicant who was the leader of the cartel and approached the CCI for leniency 'too late' in the proceedings, without any significant value add. In the same case, the 'third applicant' received a 50% waiver of penalty for disclosing information on rigged tenders that was not available with the DG. The second applicant however, qualified for a 40% waiver (10% less than the third applicant).

F. Extent of Penalty Reduction

Applicant Status	Extent of Penalty Reduction	Pre-Conditions
First Applicant	Up to 100%	Vital disclosure of evidence on cartel activity that enables the CCI to form a prima-facie opinion on the existence of a cartel.
Second Applicant	Up to 50%	In the opinion of the CCI, the evidence submitted provides significant added value to the evidence already in the possession of the CCI or DG.
Subsequent Applicant(s)	Up to 30%	In the opinion of the CCI, the evidence submitted provides significant added value to the evidence already in the possession of the CCI or DG.

The Commission may grant a penalty reduction of **up to 100%** to the first leniency applicant who makes a "**vital disclosure**" by submitting evidence of cartel activity that enables the CCI to form a prima facie opinion regarding the existence of the cartel.

Applicants after the first applicant may also be granted a penalty reduction by submitting evidence, which **in the opinion of the CCI**, provides **significant added value** to the evidence already in possession of the CCI or the Director General of the CCI (DG). In this regard, the second applicant may be granted a reduction in penalty of **up to 50%**, and subsequent applicant(s) may be awarded a penalty reduction of **up to 30%**. **Additionally**, individuals that file for leniency may also be awarded a penalty reduction that is generally equal to the penalty reduction granted to their respective enterprises.

Members of a cartel can avail the benefits of the Indian leniency regime by making disclosures, until the time the DG submits the investigation report to the Commission.

The Indian leniency program is still in its nascent stages, but has seen significant growth since 2017. The Commission passed its first leniency order in January 2017. In 2018, the CCI passed leniency orders in 4 other cases. Additionally, in 2019-2020, the CCI adjudicated 4 more cases filed under the leniency regime. The benefits awarded to leniency applicants in these cases are tabulated here:

Case No.	Name of Case	Reduction in Penalty	
Suo Motu Case No. 03 of 2014 (“Brushless DC Fans Case”)	In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items	First and only applicant	75%
Suo Motu Case No. 02 of 2016 (“Battery Case”)	In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India	First Applicant	100%
		Second Applicant	30%
		Third Applicant	20%
Case No. 50 of 2015 and Suo Motu Case No. 04 of 2016 (“PMC Case”)	In Re: Nagrik Chetna manch case, ⁵ and In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing. ⁶	First Applicant	50%
		Second Applicant	40%
		Third Applicant ⁷	50%
		Fourth Applicant	25%
		Fifth Applicant	NIL
		Sixth Applicant	NIL
Case No. 03 of 2016 (“PMC Case”)	In re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing	First Applicant	50%
		Second Applicant	NIL
		Third Applicant	NIL

⁵ Case No. 50 of 2015 dated 1 May 2015.

⁶ Suo Motu Case No. 04 of 2016.

⁷ The third applicant was awarded a higher penalty reduction than the second applicant, because the third applicant was the first to submit information in relation to three specific tenders that the Commission did not have beforehand.

Case No.	Name of Case	Reduction in Penalty	
Case No 2 of 2013 (“Sports Broadcasters’ Case”)	In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports broadcasters	First Applicant	100%
		Second Applicant	30%
Suo Motu Case No. 02 of 2017 (“Batteries Manufacturer Case”)	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India	First and only Applicant	100%
Suo Motu Case No. 01 of 2017 (“Flashlights Case”)	In Re: Alleged Cartelisation in Flashlights Market in India	First Applicant	CCI held that there was no cartelisation in this case
		Second Applicant	
Suo Motu Case No. 03 of 2017 (“Batteries Manufacturer Case”)	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India	First and only Applicant	100%
Suo Motu Case No. 07 (01) of 2014 (“EPS Systems Case”)	In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)	First Applicant	100%
		Second Applicant	50%
Case No. 05 of 2017 (“Industrial and Automotive Bearings Case”)	In Re: Cartelisation in Industrial and Automotive Bearings ⁸	First Applicant	NA (cease and desist order)
		Second Applicant	NA (cease and desist order)
Reference Case No. 3 and 5 of 2016; Reference Case No. 1, 4 and 8 of 2018 (“Brake Blocks Case”)	In Re: Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited and Others ⁹	Applicants	NA (cease and desist order)

⁸ Please note that the order was passed by the CCI in this matter in the midst of the COVID-19 pandemic. The CCI observed in its order that in light of the “peculiar facts and circumstances of the case”, no penalty needed to be imposed.

⁹ Please note that no penalty was imposed by the CCI in view of exceptional circumstances in the present case.

Notable Trends

The trend from the above cases clearly illustrates that the CCI may consider granting 100% reduction in fines or complete immunity only where the applicant has come forward and has disclosed a cartel that was previously not known to the CCI, e.g., Battery Case, where Panasonic Energy India Co., Ltd who was the first applicant and also disclosed the cartel to the CCI. In the Brushless DC Fans and the PMC Case – the investigation was already underway and a significant time had lapsed from the start of the investigation - 9 months (Brushless DC Fans Case) and 11 months (PMC Case) before parties came forward and cooperated with the investigation. Therefore, the CCI has treated the leniency application as a case for reduction of fines as opposed to grant of complete immunity. Additionally, in the orders passed by the CCI during the COVID-19 pandemic (namely, Industrial and Automotive Bearings Case and Brake Blocks Case) the CCI imposed NIL penalty.

Separately, the officers at the DG's office now encourage cartel participants to file for leniency. There is a thrust to conclude investigations faster and to this end, they pitch the leniency route to the respondents.



Dawn Raids

The Competition Act empowers the DG 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.

A. Scope of Dawn Raids

- ▮ Dawn raids are conducted as “search and seizure” operations when the CCI suspects antitrust violations.
- ▮ The objective of a ‘dawn’ raid is to collect incriminating information in documents, records, mobile phones, computers, servers, etc., which may otherwise be destroyed or secreted away by the enterprise or individuals under investigation.

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; and conduct interviews under oath.

The DG generally conducts dawn raids as a “search and seizure” operation when the CCI strongly suspects antitrust violations and the fact that evidence may be withheld or destroyed during the investigation.

‘Dawn’ raids may be conducted at any time of the day, including weekends 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.

Under the Competition Act, the DG has wide powers while conducting a dawn raid. The DG may gain access to the premises of the enterprise before, during and after business hours (including holidays); access the homes and/or vehicles of personnel; request the production of specific documents and information related to the investigation; seal business premises or documents for the duration of the investigation; ask questions and conduct interviews under oath; seize books and papers (including electronic data residing on hard drives and other electronic devices).

B. Limitations on the DG's power of search and seizure

- ⌋ The DG must first obtain a search warrant from the Chief Metropolitan Magistrate, New Delhi to conduct a dawn raid.
- ⌋ 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 premises on which the search is to be conducted.
- ⌋ Two “independent and respectable” witnesses, who are third parties that are not interested or affected by the dawn raid must be present with the DG during the raid.
- ⌋ The DG must record the details of the witnesses and their signature on the final written inventory of items that are seized. A copy of the inventory with the witnesses' signatures is statutorily required to be delivered to the occupant of the premises who is being raided.

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. An authorization for search extends to an authorization for seizure as well¹⁰, therefore, the DG is authorized to both conduct search and seize evidence during any dawn raid.

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.

C. During a ‘Dawn’ Raid

- ⌋ There is 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.
- ⌋ The enterprise must assign key members to “shadow” the investigators and take careful notes on their conduct and search.
- ⌋ The enterprise must extend its full co-operation to the investigators but need not volunteer information.

¹⁰ *Competition Commission of India v. JCB India Ltd. And Ors.*, Criminal Appeal No. 76-77 OF 2019 (@ SLP (CrI.) 5899-5900 of 2018).

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 must not interfere with the raid. In practice, these “shadows” are not actually allowed to approach the investigators and are asked to stand at the door of the room that the investigators are searching but, any mental notes that they make are valuable after the event. The enterprise should assist the investigators in copying documents or information. Investigators must not be left alone or with access legally privileged documents or documents unrelated to the investigation.

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.

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

D. After the ‘Dawn’ Raid

- ▮ A record of all documents and information that has been seized, and a record of the statements of the enterprise’s employees should be prepared.
- ▮ 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 must 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.

E. Lawyer–Client Privilege & Dawn Raids

- ▮ 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.¹¹ Further, in India, communications with in-house legal counsel may be considered as legally privileged, as long as such communications pertain to questions of law and relate to litigation.¹²

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 so. Alternatively, oral and written protests should be registered with the DG, and the enterprise must contact its lawyers immediately for suitable advice.

F. Penalties for not Complying during Investigation

Nature of Fine	Quantum of Fine
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	INR 1 Crore [approx. USD 0.14 million; Euro 0.11 million; GBP 0.09 million; JPY 14 million]
Directions of the DG or CCI are not complied with without any reasonable cause	INR 1 Lakh [approx. USD 1,365; Euro 1,133; GBP 1,000; JPY 144,096]
Failure to produce documents, furnish information, appear or answer questions or sign notes of examinations	INR 20,000 or up to 6 months imprisonment [approx. USD 273; Euro 227; GBP 200; JPY 28,819]

¹¹ *Larsen and Toubro Limited v. Prime Displays Private Limited*, 2002(5) BomC R158.

¹² *Municipal Corporation of Greater Bombay & Ors. v. Vijay Metal Works*, AIR 1982 Bom 6 at para 4.

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).

G. Indian & Global Dawn Raids

- ▮ The CCI has conducted seven dawn raids since 2009.
- ▮ 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.

The CCI has thus far conducted raids at offices of companies engaged in manufacture of batteries, railway equipment, construction equipment, beer, tarpaulin, cement and trading of pulses. The raids of the CCI over allegations of collusion on prices of railway equipment and over allegations of bid rigging of prices for tarpaulin, indicate that the CCI is focusing its raids on companies supplying goods and services to the government.

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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