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India - Due Process Issues In Dawn Raids.

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Introduction

Dawn raids are an important tool for competition regulatory agencies around the world. The office of Director General ('DG'), (the investigative wing of the Competition Commission of India ('CCI')) is responsible for conducting dawn raids in India under the Competition Act, 2002 ('Act'). The DG has already conducted a number of raids in India (the exact numbers are difficult to come by as these raids are unannounced and not formally publicised), but the rate of adoption of dawn raids has been slower in India as compared to the rest of the world. India had a rocky start with the first such raid being challenged and stayed by the Delhi High Court ('DHC') for not following fair procedure under the Act, and the Code of Civil Procedure, 1908 – the guiding statutes on procedural fairness (or due process) for dawn raids in India.^[1]

To bring more clarity, robustness and transparency to the process, mature jurisdictions have released official detailed guidelines on conducting dawn raids^[2]. To prevent future writ challenges, it's important to analyze whether the existing guidelines on dawn raids are adequate, and if they require more clarity in line with international best practices.

Powers of the DG

While conducting dawn raids, the DG is vested with powers^[3] to: (i) *Conduct search* operations for books, papers and digital data (including a forensic search on IT systems, e-mails/ mobile phones/ laptops, calendar entries and credit card statements^[4]), using reasonable force to access the office premises, domestic premises such as houses, land and other means of transport of the employees of a business; (ii) *Seize* these materials; (iii) *Seal* any business premises and books or records for the period; (iv) *Keep in its custody* such books, papers and digital data so seized until the conclusion of the investigation, if necessary; and (v) *Depose* concerned personnel under oath.

Due process issues

Recording objections: There is no set standard on where and how parties being raided ('Parties') can officially record their objections in writing for reasonable issues like: (i) deficiencies in

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the Panchnama (seizure memo) where DG officials disagree with the Parties; (ii) officials refusing to be searched before entering the premises; (iii) seizure of privileged documents; (iv) any instance where the Parties feel that search and seizure is beyond the scope of the search warrant and investigation, etc. A standard method to record objections in writing that the DG and Parties' can rely on at the time of hearing may be a remedy that the Parties can avail in the first instance. This may help reduce instances of Parties approaching the High Courts in writ jurisdiction – the only remedy currently available – for any of the due process issues listed above. Another way to help Parties record objections and create transparency in the process can be inclusion of guidelines on: (i) presence of external counsels; (ii) assertion of privilege for on-site and off-site communication with the counsels; and (iii) scope of intervention by counsels on behalf of the Parties.

Incorrect Search Warrants: The DG requires a search warrant from the Chief Metropolitan Magistrate, New Delhi ('CMM'), if there are reasonable grounds to believe that documents may be destroyed, mutilated, falsified or hidden. Such a warrant should clearly explain the scope of the investigation, address of the premises, whether search and seizure are allowed, the names of the investigating officials, date of inspection, etc. While this is mandatory, there is no clarity on the steps the Parties can take in case there are obvious issues with the warrant (*e.g.*, incorrect address or missing names of officials, etc.). Formally recording objections before continuing with the raid is one way to provide immediate relief to the Parties, without losing the essence of surprise in a raid. Officials may in parallel continue to clear the defect in the warrant by approaching the CMM, and Parties can be allowed to contest. This may speed up the procedure and make it more credible.

Seizure of materials beyond the scope of the search warrant: Recording disagreement on materials seized being within the scope of the search warrant is important for transparency. This is more relevant now as post COVID-19, more company officials are working from personal premises, prompting raids at the personal premises of senior officials of companies. Given that the nature of a dawn raid is unlike a raid under the Income Tax Act, 1961, where materials seized from all residents of a company's official's personal premises may be relevant, it may be useful to have a separate set of guidelines for dawn raids on personal premises of employees of a company. Officials are likely to pick up all materials, devices available at the personal premises, including materials that could clearly be outside the scope of the search warrant and investigation under the Act. For example, seizure of personal devices, documents of a spouse or parent of a company's official who are not part of the company could lead to writ challenges on seizure beyond scope of the search warrant, breach of privacy, etc., and may further delay the investigation.

Aspersions on 'independence' of witnesses: Before searching the premises, the inspecting officials are required under law to ensure that two 'independent and responsible' inhabitants of the locality where the place to be searched is situated are present as witnesses. This is meant to serve as a safeguard against any abuse of power that may be committed by the officials. While such requirement is necessary to ensure objectivity in the process, in reality the implementation may prove to be difficult. Separately, it may be useful to introduce guidelines to clarify criteria for ascertaining independence of a witness (*e.g.*, they should not be directly/indirectly related, either personally or professionally to any official currently working at CCI/DG's office, they should necessarily be a resident of the locality (within a specified range) where the raid is being conducted, etc.).

Disagreement on legally privileged documents: Currently, there is no regulatory clarity on (i) what documents qualify as legally privileged in line with applicable laws; and (ii) the immediate remedy in case of disagreement on the privilege status of documents (*e.g.*, they can be seized under a sealed envelope).

Disclosure of statements: Copies of all statements recorded whether formally or informally should be shared with the Parties. This is in line with international best practices,^[5] and necessary to maintain transparency in the process.

Conclusion:

One easy way to address the issues highlighted above can be CCI publishing best practices manual to make the process more robust, transparent, and enforceable for the agency and well as the Parties. Currently, a party can only challenge non-compliance with due process during dawn raids, in writ proceedings before the High Courts of India. If such a challenge is allowed – CCI/DG will likely be restrained from using any part of the material seized, statements, information collected during a dawn raid. This would not only significantly impact ongoing investigations but also cause unnecessary delays, reputational harm to the regulator, apart from diluting the credibility of dawn raids in India.

Best practice guidelines on conducting dawn raids, especially the manner and method to record written objections may reduce instances of delay and bring the Indian dawn raid process in line with international best practices.



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[1] In the first dawn raid in India on JCB India Ltd. ('JCB'), the search and seizure was challenged based on the search warrant not including the right to seize material. While the DHC allowed the challenge and ordered setting aside of the seized material, the Supreme Court of India overturned DHC's decision (Competition Commission of India v. JCB India Ltd. and ors., 2019 SCC OnLine SC 625) on the ground that search invariably includes seizure of material because a search by itself will not be sufficient for the purposes of investigation.

[2] European Commission has released the Explanatory Note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003, available here:

https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf

[3] Under Section 41 read with Section 36 of the Act, the DG is vested with the same powers as that of an inspector under the Companies Act, 1956 – these powers include: summoning and enforcing the attendance of any person and examining him on oath;

- 1. requiring the discovery and production of documents;*
- 2. receiving evidence on affidavit; and*
- 3. issuing commissions for the examination of witnesses or documents.*

[4] Competition Commission of India v. JCB India Ltd. & ors., 2019 SCC OnLine SC 625.

[5] Point seven and eight of EC's Explanatory Note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003, available

here: https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf

