

Dawn Raids–Issues and Challenges under The Indian Competition Act, 2002

G.R. Bhatia*

“Dawn Raid” is a common tool used by an Investigating arm of competition agency (In India - Director General (DG) of Competition Commission), to gather documentary and other evidence in an anti-trust probe. Businesses and trade bodies faced with investigation/inquiry for suspected infringements, run a risk of their premises being ‘raided’ by DG. There is thus immense need to understand the (I) the limits, conditions and manner in which the ‘unannounced raid’ can be undertaken, (II) the rights and obligations of investigated enterprise; and (III) post raid actions. Prudence suggests to have in place a detailed customised programme to minimise its likelihood or to effectively meet it as evidence gathered during ‘search & seizure’ is foundation & precursor to outcome of Inquiry.

“Dawn Raids” colloquially known as “unannounced search and seizure” is a common tool that may be used by the investigating arm of a competition agency to gather documentary evidence in an anti-trust probe. Such visits by officials of the competition agency are increasingly becoming a global phenomenon. The competition jurisprudence also suggests a higher rate of detection of anti trust infringements in cases where raids are undertaken. To mention few:

- (a) In February 2009, EU and US competition authorities launched a joint, fully synchronised dawn raid on the refrigeration compressor industry across these two continents and the searches primarily contributed in proving the infringement of the competition law provisions;
- (b) In October 2006, in Singapore, the CCS carried out dawn raids on six pest control companies after a complaint of collusion in submitting tenders for termite treatment projects was received and recently these six companies were fined \$ 262,759.66;
- (c) In December 2009, in Poland, the Polish Competition Authority undertook biggest dawn raids on major cement players. The raid revealed documents *inter alia* relating to resale price maintenance for an unprecedented period of 11 years and a total fine of 108 million euros was imposed on seven cement makers;
- (d) In South Africa, a dawn raid was conducted on the offices of Airlines Association of Southern Africa for alleged settlement agreement; in April 2007, the Commission unleashed a dawn raid upon the tyre industry, seizing documents from Dunlop Tyres International, Bridgestone SA and SA Tyre Manufacturers Conference; in May, 2010, raid was conducted on four electric cable companies for alleged price fixing;
- (e) In November 2010, in Brazil, the Secretariat Economic Law (SDE) has raided a handful of companies and home of former Government official for suspected bid rigging conspiracy; and
- (f) In January 2008, in Japan, the JFTC conducted dawn raids on three galvanised steel sheet makers for participating in a price fixing cartel and these companies were fined an aggregate of 15.5 billion Yen, the highest amount yet imposed by the JFTC.

These surprise inspections occur without warning and are usually conducted at times when least expected often at the crack of dawn and during weekends. The “raids” are conducted in a covert manner leaving no scope with the party under investigation to scuttle the search in any manner and also not to give any opportunity to “sanitize” the records. In case of multi-national corporations, simultaneous raids can be coordinated in several jurisdictions and at different locations in the same jurisdiction. Further, raids can be conducted regardless of size of the enterprise, nature of business and both at business and personal premises.

Cartel conduct is a fertile ground for dawn raids. As obtaining convincing evidence on price fixing and other concerted practices between rivals is extremely tricky, there can be little doubt that the frequency of dawn raids will be stepped up steeply in times to come.

In line with international trend, the Indian Competition law also empowers the Director General (the investigating arm of the CCI) to undertake such “search and seizure”.¹ An irrefutable fact is that a raid is the most intrusive and disruptive experience that is faced by an alleged delinquent. Businesses and their associations, against which investigations are ordered pursuant to commencement of an Inquiry for suspected infringement of the Act, run a risk of their personal/official premises being “raided” by the Director General. Thus, there is immense need to understand the—(I) the limits, conditions and manner in which the “unannounced raid” can be undertaken by the DG; (II) the rights of investigated enterprise; (III) the obligations of an enterprise faced with such search and seizure and (IV) post raid actions.

The scope, ambit and gravity of these dimensions are of great relevance for an “enterprise and its principal officers” as unearthing of documents in the wake of a raid is the foundation and precursor to the final order of an Agency. Further, there is an obligation to cooperate/assist the investigator failing which penal provisions are triggered. The in-house legal counsel also need to take note of this aspect of law as he/she is the first port of call for a company which is faced with anti trust inspector at its door.

(I) Limits, Conditions and Manner in which “unannounced raid” can be undertaken by the Director General (DG)

- (i) Though, the office of DG² is meant to assist the CCI in investigating into any contravention of Act/Rules/Regulations; however, it is incumbent upon the DG to be fair and impartial in carrying out the investigation as well in drawing his findings/conclusions in the Report. The process and product of DG have to be reasoned in order to meet the counter arguments of the charged enterprise or the referrer, as the case may be;
- (ii) Investigation by the DG begins only when directed by the CCI and formation of a *prima face* case of contravention of the Act by the CCI ought not influence the investigation undertaken by the DG;
- (iii) On receipt of order of investigation, the DG in the first instance is to send a “questionnaire” to the alleged charged party to respond and to furnish documents/evidence in support thereof. The DG is vested with powers of a civil Court in carrying out investigation and therefore, it is advisable for the addressee to furnish correct & complete information/documents failing which—(a) non-compliance/disobedience liability devolves on the addressee and (b) prompts DG to invoke powers of “search and seizure” with the approval of Chief Metropolitan Magistrate, New Delhi;
- (iv) The analogous power in DG of seizure as are vested in an Inspector under Section 240A of the Companies Act, 1956 are not open ended. The “search & seizure” can be undertaken only when he has reasonable ground to believe that the books and papers of, or relating to, any company or other body corporate may be destroyed, mutilated, altered, falsified or secreted. The expression “reason to believe” has been viewed as:

The crucial expression “reason to believe” postulates belief and the existence of reasons for that belief. The word “reason” means cause or justification and the word “believe” means to accept as true or to have faith in it. The belief may not be open to scrutiny as it is the final conclusion arrived at by the officer concerned, as a result of mental exercise made by him on the information received. The existence of reasons to believe is supposed to be the check, a limitation upon the power.³

The expression “reason to believe” is stronger than the expression “is satisfied”. Belief should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material.⁴

Belief must be held in good faith. It can not be merely pretence. It is open to Court to examine whether reasons for belief have a rational nexus or a relevant bearing to the formation of belief and are not extraneous or irrelevant for the purpose of the Section. To that limited extent, action of the assessing officer in initiating proceedings under Section 147 can be challenged in a Court of law.⁵

There must be reasons to induce belief. The same should be by reason of omission or failure on the part of assessed to disclosed fully and truly his income.⁶

- (v) The principles as emerge from the case law are:
 - (a) the authority must be in possession of information and that reason to believe that the addressee would not disclose;
 - (b) the information must be in existence and it should not be merely rumour;
 - (c) the active application of mind on the information is a condition precedent and is open to scrutiny;

- (d) the Court will not go into the question of sufficiency of material and that it will not sit in appeal.⁷

The jurisprudence evolved clearly indicates that the DG does not have unbridled powers to invoke provisions relating to “unannounced raid” at the premises of the charged party and/or person related thereto and that law and precedents do prescribe the limits, conditions and manner in which DG can resort to “search & seizure”.

(II) The rights of the company facing “raid”

- (i) The representative of a raided company may request the DG to allow a reasonable time for the in-house counsel or external counsel to arrive. However, it is not obligatory for the investigator to wait for the arrival of the counsel;
- (ii) The representative has a right to ask for the identity and the order of the CMM, Delhi and the scope of dawn raid. It is advisable to confirm the authenticity of the dawn raid by telephoning the Director General;
- (iii) Take steps which are necessary to preserve the documents or prevent any interference with them;
- (iv) Keep full record of all questions asked and answers given and make copies of all documents copied by the officials;
- (v) The representative can object to the review or taking of copies of privileged documents including confidential communication between the client and its external attorney; and
- (vi) It is not within the power of the investigating officer to:
 - (a) use force against any person,
 - (b) examine any document or take copy of documents which are not relevant for the purpose of dawn raid and
 - (c) documents which enjoy legal privilege.

(III) Obligations of the investigated company

It is obligatory on the functionary of the investigated company to:

- (i) furnish to the point and correct explanation/answer relating to a document covered in the search and keep a record of all questions and answers;
- (ii) furnish location of a document as per person’s knowledge and belief, electronic information to be produced in hard or soft copy. DG can seize only those mails/electronic records which are relevant to the investigation and do not enjoy privilege. In case the whole email box is seized, the inspector can open the box subsequently, in the presence of authorised official of the investigated enterprise and the inspector has to return all other mails which are personal and not construed to be relevant for the investigation. On 2nd November, 2010, the Paris Court of Appeal has objected to the seizure of the whole content of email boxes by the French Competition Authority. The Court, however, ruled that the seizure of certain personal documents belonging to employees or documents that may be irrelevant to the investigation, does not invalidate the entire search which was pre approved by the Judge.⁸ However, there is need to strike a balance between the powers of DG during dawn-raids and the data protection and privacy of the individuals. The principle as to legitimacy, proportionality and transparency during such dawn raids needs to be observed and these be incorporated in the Manual of Office Procedure which is under preparation by the Office of DG⁹;
- (iii) not to obstruct or recklessly destroy or otherwise falsify or conceal the documents of which production has been required; and
- (iv) not providing information knowingly which is materially false.

(IV) Post dawn raid steps by the Investigated company

- (a) Before the DG team departs

There is need to determine if/when the inspector will return next day, ensure to have copy of documents (both electronic and otherwise) taken by inspector, make a request for a copy of written records of interviews taken by the inspector and make a record in the event of refusal. Take a copy of minutes and ensure recording of disputes and disagreements therein.

- (b) After the DG Leaves

Compile all your notes, recheck inspector's written records including interviews and computer searches, prepare your own report and conduct final meeting with the in-house legal head/external counsel for review to identify potential issues, analyse and assess risk and scope of enquiry.

The DG can keep in his custody the documents/records seized for such period not later than the conclusion of the investigation as he considers necessary and thereafter, there is an obligation to return the same to the investigated company or any other person from whom custody these were seized.¹⁰ The DG is also required to inform this position to the CMM, Delhi with whose approval the dawn raid was undertaken.

Key Take Always

Undoubtedly, "dawn raids" tarnish the image and goodwill of a raided company and its management. It dampens the business prospects of the raided company in the ever growing competitive environment. Thus, it is imperative for business and their associations to ward off and guard of such unpleasant visits and visitor. Prudence suggests that the business and the concerned trade bodies should have in place a detailed programme to effectively meet the requirements of such search & seizure.

Enterprises against which enquiries have already commenced should in the first instance extend full cooperation/assistance and furnish complete and correct information/documents within the given time. Adherence to this golden principle not only rules out triggering of penalty provisions but also minimises the risk of being raided by the DG. However, taking cue from global experience, size and success in business does attract scrutiny through such mode. It is therefore, critical for such target company to designate an officer(s) as a "Dawn Raid Warden" who should ensure a full fledged programme encompassing—(i) dawn raid training, (ii) guidelines/checklists before, during and after the dawn raids, (iii) instant response team during the visit and (iv) follow up action. It is difficult to suggest a tailor-made programme in view of variance as to nature and size of business, total market and structure thereof, kind of trade practices being probed etc. and all these heterogeneities necessitate a customised detailed dawn raid programme.

* Partner & Head of Competition Law Practice, Luthra & Luthra Law Offices, New Delhi. He is "Competition Law Expert" of London International Court of Arbitration (LICA). He is a former Additional Director General of the Competition Commission of India (CCI) and Monopolies & Restrictive Trade Practices Commission (MRTPC), New Delhi. The views expressed are personal. E-mail: gbhatia@luthra.com

- 1 Such power *was* never invoked by the Director General (Investigation & Research) under the repealed MRTP Act, 1969.
- 2 DG means *the* Director General appointed under Sub-section (1) of Section and includes any Additional, Joint, Deputy or Assistant Director General appointed under that Section 16(1) of the Act.
- 3 In *Barium Chemicals Limited v. Company Law Board* (MANU/SC/0037/1966 : 36 Comp Cas 639 (SC) : 1966 Suppl SCR 311 at 361: AIR 1967 SC 295 AT 324.
- 4 In *Ganga Saran & Sons (P) Ltd. v. ITO* MANU/SC/0297/1981: (1981) 130ITR 1 (SC).
- 5 In *S. Narayanappa v. CIT* MANU/SC/0124/1966: (1967) 63ITR219(SC) Ub
- 6 In *R. Dalmia v. UOI* MANU/DE/0408/1971: (1972) 84ITR616 (Delhi).
- 7 Guide to SEBI Capital Issue Debentures and Listing (2003) pg 282 by K Sekhar.
- 8 *Janssen-Claig* case illustrates how the investigative powers of the competition authority may conflict with employee's right to privacy and shows that there is a possible conflict of laws between data protection Act and competition law. While the plaintiff argued that the competition officials had used unnecessary and disproportionate means to gather the evidence, including global and massive seizures, which disrupted the normal functioning of the company. However, the court cancelled seizure of three computer files but validated the investigation on the grounds there was no evidence that the officials had not selected in advance the documents seized, nor that the seizure was disproportionate. The Court also validated the investigation on the grounds that it had used only methods enabling them to preserve the accuracy and reliability of the relevant documents.
- 9 Presentation by the Director General on 19th October, 2010 in 2nd International Conference on Competition Law, held in New Delhi to commemorate the 1st Anniversary of the Competition Appellate Tribunal.
- 10 Before return of these seized documents, the DG can place identification marks in terms of proviso below Section 240(1A) of the Companies Act, 1956.