

THE CONCEPT OF DAWN RAID AND THE FIRM'S RIGHT TO COUNSEL

Introduction

Dawn raid refers to the practice of conducting “unannounced search and seizures” by the investigating officer to investigate suspicions of anticompetitive agreements or other potentially violating antitrust law agreements entered into by firms.

It has been [recognised](#) in India that dawn raids are important to obtain evidence in cases where there exists no direct evidence of anti-competitive agreements. Therefore, dawn raid has been acknowledged as a tool to take prompt action. However, in the same vein, where the investigating officer of the Competition Commission of India (“CCI”) i.e. the Director-General (“DG”) has been entrusted with wide powers to conduct an investigation, the firm seems virtually helpless in cases where its lawyer is not present.

This article will elucidate on the concept of dawn raid in India and how internationally it has been understood to be intrusive. Further, it addresses the pressing issue of risk of leaking privileged communications during dawn raids and how it becomes invasive in the absence of a lawyer.

Legal Framework

Section 3(1) of the Competition Act, 2002 (“Act”) puts a restriction on the firms from entering into anti-competitive agreements which cause or are likely to cause an Appreciable Adverse Effect on Competition (“AAEC”). Such agreements are considered void according to Section 3(2) of the Act.

If the CCI is of the opinion that a *prima facie* case exists with regards to such an anti-competitive agreement then it shall direct the Director-General to conduct an investigation under Section 26(1) of the Act.

Under Section 41(3) of the Act, the [power](#) of the DG to conduct dawn raids extends to exercising ‘search and seizures’ operations. This power is equivalent to that of an

inspector as given under Section 240A of the Companies Act, 1956. Hence, it is empowered to -

- a) Enter with such assistance as may be required, the place or places where such books and papers are kept;
- b) To search that place or those places in the manner specified in that order;
- c) To seize books and papers he considers necessary for the purposes of his investigation

The scope of DG's power during dawn raid has been recently observed by the Supreme Court in the case of [Competition Commission of India v. JCB India Ltd. and Ors.](#)

In this case, the Supreme Court [observed](#) that the power of DG to conduct an investigation extends to search and seizure as unless seizure was authorised, mere search by itself will not be sufficient for the purposes of investigation.

The role of lawyer

The role of a lawyer assumes importance in a dawn raid. Lawyer helps in identification of relevant materials and documents for the purpose of investigation and safeguards the privileged communication between the firm and lawyer. It has been [observed](#) that lawyer has a fundamental role to play in such circumstances.

Moreover, in the [Deutsche Bahn case](#), the intrusive nature of dawn raid was highlighted as the inspection also seized the documents related to a different infringement. The European Court of Justice observed that all information gathered during investigation should relate only to concretisation of the prima facie case. Therefore, the inspection in the case was vitiated due to this irregularity. Hence, the presence of lawyer is [necessary](#) in such raids as it helps to prevent such irregularities. This also protects the firm's right to defence.

Furthermore, the scope of lawyers' role may extend to conducting [debriefing meeting](#) post raid. In this meeting the lawyer is required to ascertain whether there are any merits in the allegations raised against the company. The role might also

include the [future course of action](#) with the management of the firm which includes furnishing other information which the commission might require.

Firm's Right to Counsel and Due Process

According to Section 36(1) of the Act, the CCI is guided by the principles of natural justice which [includes](#) the right to be heard. Right to be heard encompasses the right to legal representation. Thus, the right to counsel is a natural justice principle which emanates from [audi alteram partem](#).

The scope of this right was discussed implicitly by the Supreme Court in the case of [CCI v. SAIL](#). In this case, while restricting the application of natural justice in case an order for investigation is passed under Section 26(1), the Court observed that natural justice can be excluded at the initial stages where the opportunity of being heard would obstruct the taking of prompt action.

Court affirmed that since the investigating officer is not deciding any matter but only collecting evidence for ascertaining if a *prima facie* case is made or not, the rule of *audi alteram partem* can be excluded.

The application of this judgment has adverse implications for the rights of the firm as it is against due process. This is because the DG which is a government entity may harm the firm by not following the accepted course of law which requires the observance of natural justice.

According to the rule of *audi alteram partem*, even if there is an emergency, the administrative action cannot be taken in haste and such an action should be quashed. There have been cases of [disproportionate](#) dawn raids in Belgium and the Netherlands due to lack of necessary safeguards particularly the presence of lawyer.

Further, the position under the EU antitrust law is such that it allows for a legal counsel at the investigative stage as well. In the landmark cases such as [Hoechst v. Commission](#) and [AM&S v. Commission](#), the ECJ held that the “right to legal representation and the privileged nature of correspondence between lawyer and client must be respected from a preliminary inquiry stage.”

The *Cour de Cassation* [recently](#) recognized the right to defence during the investigation process when it held that the French Competition Authority had breached firm's right to defence while conducting search and seizure. In this light, the Court observed if the authority obstructs the firm from exercising the right to defence, then the evidence collected shall be vitiated.

Similarly, the European Court of Human Rights ("ECHR") [ruled](#) in respect of a recent dawn raid conducted by the Czech Competition Authority in Delta Pekarny case that there should be sufficient procedural safeguards for dawn raids, particularly in cases when they are carried out by national authorities.

In [Michaund v. France](#), ECHR observed that an absence of lawyer is representative of self incrimination and denial of fair trial. Thus, if the violation causes prejudice to the accused, the evidence should be excluded.

Conclusion

The Competition Act, 2002 is silent with respect to the right to counsel during dawn raid. Nevertheless, it is recommended that a lawyer should be present. In cases where the lawyer has not arrived, the firm [may persuade](#) the officials to differ for the time being. Though they are not obligated to do so.

The Supreme Court has observed that the DG may not wait for the lawyer to come and can proceed to conduct the investigation. However, the right of the firm is prejudiced in such situations. This is because the period during which the lawyer is not present, the DG might search and seize those documents which are protected by virtue of being privileged communications. Such actions when taken simply reflect the ability of the DG to act arbitrarily.

In order to remedy this malaise, the authors suggest that the company should be given the right to ask the DG to [seal](#) pack every evidence collected in the absence of a lawyer. These sealed evidence should later be opened in the presence of a lawyer. In case the lawyer is of the opinion that a document sealed constitutes a privileged one, he may communicate the same to the DG. Thus, the firm's right to defence is

protected and safeguarded against arbitrariness, if at all exercised by the DG in the absence of a lawyer.

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