



# Concurrences

ANTITRUST PUBLICATIONS & EVENTS

## Competition Inspections in 21 Jurisdictions

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### A Practitioner's Guide

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Foreword by Paul Nihoul

# INDIA

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# Introduction

1. The Competition Act, 2002 (Act) is the primary legislation empowering the Competition Commission of India (CCI) to investigate companies and other bodies suspected of breaching Indian competition law and impose sanctions in case of breach.
2. Indian competition law aims at preventing practices having an adverse effect on competition, promoting and sustaining competition in markets, protecting the interests of consumers and ensuring that freedom of trade is carried on by other participants in markets in India. Section 3(1) of the Act prohibits anti-competitive agreements which cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India. Section 4 of the Act prohibits the abuse of a dominant position by an enterprise or a group.
3. Under the Act, an alleged anti-competitive agreement or abuse of a dominant position can be brought before the CCI in three ways – on its own motion (*suo moto*), on the basis of a complaint filed by any party (an information) or following a reference from a government or statutory authority. Investigations into horizontal agreements (including cartels) can be initiated pursuant to a leniency application – the CCI treats this as a *suo moto* case to protect the confidentiality of the leniency applicant.
4. If based on the evidence available on record before it, the CCI arrives at a prima facie view that a contravention of the Act has taken place, it will order a detailed investigation into the matter. The investigation is conducted by the CCI's independent investigative wing, the office of the Director General (DG). The DG has wide powers, including the power to conduct search and seizure operations (a dawn raid or inspection).
5. Compared to other authorities and agencies around the world, the DG has used its power to conduct dawn raids/inspections sparingly. Even after a decade of enforcement of Indian competition law, the number of inspections conducted remains in the single digits. Having run into court challenges following its first inspection at JCB India Limited in 2014, the DG conducted its second inspection in the dry-cell batteries market in 2016. It conducted inspections on beer manufacturers in 2018, and picked up the pace in 2019 when it conducted three inspections. Two of these were bid-rigging cases involving supplies to the Indian Railways and the Food Corporation of India, and a third involved alleged collusion by commodity traders in relation to supply of pulses. The number of inspections declined during the Covid-19 pandemic because of lockdowns and the deadly second wave in India in early 2021. Even so, the DG conducted raids on cement manufacturers in December 2020 and certain vegetable seed manufacturers and alcohol distilleries in 2021 once pandemic-related restrictions were relaxed. As a general trend, we expect the CCI/DG to increase the use of dawn raids/inspections as an investigation tool in the coming years. Indeed, the DG has signalled its intention to use them more routinely as a method of collecting evidence of breach.

6. The lack of inspections has not meant a decline in investigations. Since the inception of the current enforcement regime, the CCI has considered more than 1,000 cases under sections 3 and 4 of the Act and ordered investigations in more than 450 cases.<sup>1</sup> In the financial year 2020–21, the CCI ordered investigations in 17 cases and closed 38 cases at the *prima facie* stage.<sup>2</sup> In practice, the CCI/DG largely use written requests for information and depositions, and the significance of these tools during investigations is unlikely to reduce over the coming years.<sup>3</sup>
7. The Act applies to everyone, companies and individuals, both domestic and multi-national. The potential consequences for non-compliance include severe administrative fines and follow-on damages claims. Investigations, including inspections, can also entail high costs and reputational damage. Investigations may sometimes start on the basis of slender information and can be very onerous. Any non-compliance or non-cooperation during inspections (and investigations in general) could also lead to separate penalties and consequences for companies and their officers. Further, the dawn raid procedures in India can be aggressive, with the DG taking an invasive approach and allowing limited recourse to external lawyers during the course of the inspections.
8. Companies should thus address the risk of inspections in advance. As part of the preparation, there should be compliance programmes and training to ensure that management and employees are aware of what to expect, and of their rights and obligations. Important decisions may need to be taken quickly, particularly if the company is considering applying for leniency right after the inspection.

## 1. Nature and Scope of Competition Inspections

### 1.1. Enforcement and Investigation Powers

9. Antitrust investigations in India may be simple (e.g. a notice from the DG requesting information)<sup>4</sup> or more invasive (e.g. a dawn raid).<sup>5</sup> The DG is responsible for conducting dawn raids in India under the Act, and does so with prior authorisation in the form of a search warrant from the Chief Metropolitan Magistrate, New Delhi (CMM), which is typically obtained in private.
10. Section 36 of the Act empowers the CCI to regulate its own procedure. Section 36(2) states that the CCI shall have the same powers as those vested in a civil court under the Civil Procedure Code, 1908 (CPC) for discharging functions under the Act. These powers include summoning any person and examination on oath, requiring discovery and production of documents, receiving evidence on affidavit, and issuing commissions for the examination of witnesses or documents. The CCI can compel persons to attend, give evidence, or produce documents.

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<sup>1</sup> CCI Annual Report <<https://www.cci.gov.in/sites/default/files/annual%20reports/ARENG2020-21.pdf>> 12.

<sup>2</sup> *ibid.*

<sup>3</sup> Even where there has been a dawn raid, such written requests and depositions may be used later in the proceedings.

<sup>4</sup> Issued under section 41(2) read with section 36 of the Act.

<sup>5</sup> Section 41(3) of the Act. The term “dawn raid” is a little misleading – it is in fact a surprise raid and is likely to start during normal working hours.

11. Section 41 of the Act deals with the role of the DG in investigating contraventions. Section 41(2) states that the DG has all the powers conferred upon the CCI under section 36(2) of the Act (see para 10). The specific powers of the DG during a dawn raid are discussed below (see para 12).

## 1.2. Competent Authorities and Agents

12. The DG is responsible for antitrust investigations in India, including inspections. In conducting a raid and obtaining documents and other evidence, the DG exercises wide powers, equivalent to those of an “inspector” under the Companies Act, 1956 (CA 1956) (now Companies Act, 2013 – CA 2013). The officers of the DG (DG officials) conducting a dawn raid may:
  - use reasonable force to access the premises, including domestic premises and means of transport;
  - actively search for information;
  - examine books and other records related to the business (physical and electronic form);
  - seize, take copies and originals of documents including data, agendas and minutes of meetings, internal memos, notes, faxes, emails and other documents in physical and electronic form (their examination is subject to legal privilege, discussed at paras 51–56);
  - seize and copy hard drives, servers, electronic handheld devices including laptops, mobile phones and tablets, as well as request access to personal email IDs;
  - seal and restrict entry to any business premises and books or records; and
  - take statements on oath.
13. The DG conducts an in-depth and invasive investigation and can ask for detailed and historical information, voluminous documents and records (including emails and telephone records). The Act imposes a penalty for failure to comply with the directions of the DG and non-furnishing of information (discussed at paras 41–43).
14. For inspections, the DG usually assembles a team based on the expected scope of the investigation and logistical factors, comprising the lead investigating officers on the case supported by other DG officials (investigating officers, data operators, IT professionals, etc.). Police officers may also accompany the DG officials during inspections. An inspection team may comprise between five and fifteen persons just for one site.
15. Before commencing an inspection, the DG officials must present two “independent and respectable” witnesses who are inhabitants of the locality where the office/premises being searched is located. Their presence and their confirmation that the search was carried out in an orderly way are recorded in the search memo (*panchnama*) completed at the end of the dawn raid (discussed below at para 38). This is meant to safeguard against any abuse of power by the DG officials.

## 1.3. Nature of Inspection Powers

16. The basic tenet of a dawn raid is the element of surprise and a reasonable belief that evidence may not be available for long in the same form or manner if not seized. Although contraventions under the Act are civil/administrative in nature,

inspections can be invasive as these are conducted under the provisions of the Code of Criminal Procedure, 1973 (CRPC) and come with attendant powers of arrest in case of non-cooperation.

17. Inspections can take place simultaneously in different premises of companies and even trade association offices. It is possible for the DG to inspect the homes and vehicles of suspected employees.
18. As stated above, before an inspection can take place, the DG must obtain a search warrant from the CMM after satisfying the CMM that there is a reasonable belief that in the absence of the inspection, information or documents may be destroyed, mutilated, etc. (see paras 25–26 on the requirements for a search warrant). The DG is required to suspect an infringement before using investigative powers and cannot go on a fishing expedition. The search warrant should be correctly dated, identify the subject matter and purpose of the investigation, and should accurately record the addresses of the offices/business division/premises to be inspected. However, the search warrant is likely to be broad in scope and give the DG officials access to the entire premises/vehicle and the power to search and seize documents. It is vital to review the search warrant carefully to ensure that the DG officials do not exceed their powers.
19. The company being inspected (and its officers/employees) is legally obliged to preserve and produce documents (including electronic formats) that are in its custody, even where such documents are potentially incriminating or legally privileged (subject to asserting legal privilege, discussed at paras 51–56). Access cannot be denied to the DG officials, even where electronic documents are stored in a server situated outside India, as long as the relevant employee<sup>6</sup> has custody or access to such information. Access can be denied to documents related to an entity other than the relevant entity being investigated under the search warrant.
20. During the raid, the DG officials can also direct employees to furnish passwords, passcodes or biometrics, enabling the opening of premises or devices (such as smartphones and email accounts). If the DG officials decide to seize personal items, objection to such seizure should be recorded in the *panchnama* (discussed at para 38), and appropriate legal recourse considered. Although the inspection powers may conflict with the rights and liberties of the companies and their personnel, there is presently little jurisprudence on the intersection of the fundamental rights (including the right to life and the right to privacy) and powers of DG officials to conduct a dawn raid under the Act.
21. The company and its employees are also obliged to answer factual questions during the raid (both on oath and otherwise) and must do so truthfully based on their actual knowledge.

#### **1.4. Areas of Competition Enforcement Concerned**

22. The CCI is empowered to direct the DG to investigate any contravention of the Act or rules and regulations issued thereunder. The DG may thus conduct an inspection for any investigation under sections 3 or 4 of the Act, respectively

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<sup>6</sup> The term “employee” covers all officers, employees and other personnel of the company regardless of their actual legal status.

relating to anti-competitive agreements and abuse of dominance. Although it is also possible to investigate a combination under the merger control regime, the CCI has not sent a combination for investigation by the DG to date.

23. In India, nearly all dawn raids so far relate to alleged cartel or bid rigging violations under section 3 of the Act.<sup>7</sup>

## 2. The Legal Basis for the Inspection

24. Section 41 of the Act deals with the role of the DG in investigating contraventions under the Act. Section 41(2) states that the DG has all the powers as conferred upon the CCI under section 36(2) of the Act. Further, section 41(3) states that, without prejudice to section 41(2), sections 240 and 240A of the CA 1956 (amongst other things, dealing with search and seizure) shall apply to an investigation by the DG (or anyone investigating under its authority). Thus the Act currently does not contain a self-contained code setting out the powers of the DG during investigation, including powers of search and seizure, and instead refers to provisions of the CA 1956.
25. As stated above, a search warrant for a dawn raid is required to be issued by the CMM (under section 41 of the Act read with section 240A of the CA 1956). However, the CA 2013 has replaced the CA 1956 and the provisions in the CA 2013 analogous to sections 240 and 240A of the CA 1956 would now apply to an investigation by the DG. These sections are section 217 and section 220 of the CA 2013.
26. One important aspect is that section 220 of the CA 2013 does not expressly refer to the requirement of an authorisation for the inspection. Therefore, it could be argued that the DG does not require a search warrant from the CMM to conduct inspections. However, given that the raid itself is required to be conducted in accordance with the CRPC, a judicial authorisation for an inspection is required. As such, the DG officials are likely to seek a search warrant from the CMM in order to avoid procedural challenges to the raid. There has so far been no judicial review challenge to these provisions for the procedures followed by the DG officials while conducting inspections.
27. The Indian Ministry of Corporate Affairs constituted the Competition Law Review Committee (CLRC) in October 2018 to review and suggest changes in substantive and procedural aspects of the competition regime in India. The CLRC submitted its report in July 2019.<sup>8</sup> In relation to the anomaly mentioned above, it noted the need to ensure clarity of rules and processes. The CLRC recommended that the powers of investigation of the DG, more particularly the power of search and seizure, should be codified in section 41 of the Act itself. It further recommended that section 41 retain the requirement to obtain authorisation from the CMM for conducting search and seizure.
28. The Competition (Amendment) Bill, 2020 (Bill) has been drafted to amend the Act.<sup>9</sup> The Bill provides for the amendment of section 41 to include the power of

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<sup>7</sup> The first dawn raid, involving JCB, exceptionally involved allegations of abuse of dominance.

<sup>8</sup> See <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> 90, s 8.

<sup>9</sup> See <[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/bill.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf)>.



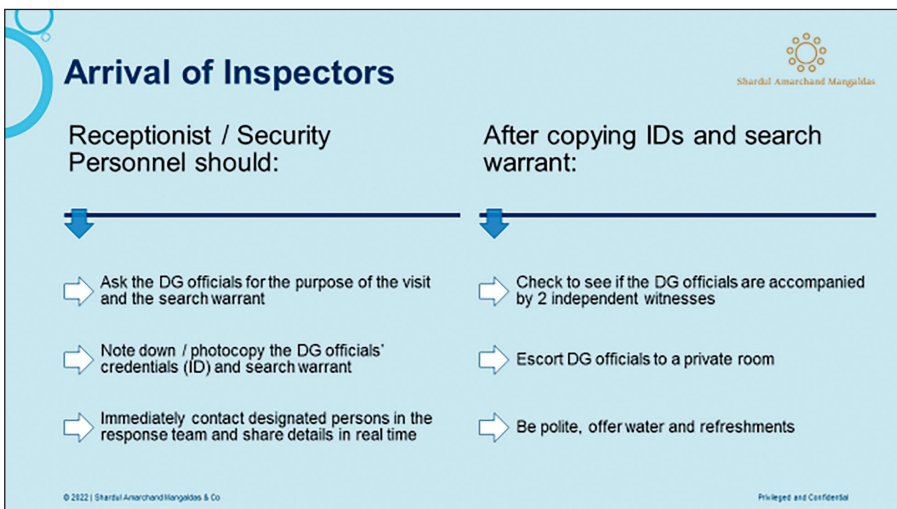
search and seizure in the Act itself and maintains the requirement to obtain an order for seizure from the CMM for an inspection. The Bill also clarifies that the DG may requisition the services of any police officer or any officer of the Central Government, or both, to assist during a dawn raid. However, the Bill has not yet been tabled before the Houses of Parliament.

### 3. The Start of the Inspection

29. It is important for companies to identify a dawn raid response team (DRRT) in India. This team needs senior-level managers and key administrative persons who are fully briefed on the procedures to be followed in the event of an inspection. It should also include the company's legal head. The DRRT will act as the company's first line of defence during the inspection.

#### 3.1. The Arrival of Inspectors

30. Dawn raids usually begin in the morning, between 8 a.m. and 11 a.m., and typically last late into the night. They can extend to the next day or two, depending on the extent of the search and interview processes. The receptionist/security personnel are tasked with triggering the company's dawn raid response process.



31. The DG officials will likely lock down the premises to ensure no entry or exit. Typically, they will also seize mobile devices of key persons (MD/CEO, CFO, sales head, etc.) immediately upon arrival.
32. Once the designated members of the DRRT get the message from the receptionist/security personnel that the DG officials have arrived, the following need to be notified:
- general counsel/legal head;
  - senior-most company executive on site; and
  - relevant DRRT members.

33. A senior member of the DRRT (the DRRT leader, who can be the legal head or a senior executive)<sup>10</sup> should promptly alert external legal counsel and DRRT leaders at other company sites of the raid before going to meet the DG officials, as they are likely to seize mobile phones afterwards. The DG officials are unlikely to wait for external counsel to arrive on site before commencing the inspection. Although the DRRT members may politely request the DG officials to wait, they are not obliged to wait or even allow the entry of external lawyers. The external lawyers should send their signed authorisation letter (with names of lawyers who will be present) to the DRRT leader before they leave their offices, so there is no obstruction for non-authorisation. If present on the premises, external lawyers can prepare individuals to be questioned and debrief them after questioning. The right of a client to have external lawyers present during the questioning of employees is currently limited (see para 58).
34. After greeting the DG officials, the DRRT leader should clarify that they will be the main point of contact for the duration of the dawn raid. The DRRT leader should attempt to ascertain the reason for the raid, the scope of the investigation, and examine the search warrant in detail to check that details/addresses of the premises are mentioned accurately and take note of any CCI case details (case number, etc.). While the DG officials may be asked to wait for all relevant DRRT members to arrive, they may not be willing – they will generally themselves determine the way to conduct the inspection and will often decline suggestions that they sit in a given area. Their wishes should be respected and any suggestions made constructively and politely, without pressing them unduly.
35. If the DG officials are not able to produce a written and valid search warrant/ID proof or if these are incomplete or defective, access should be refused in the first instance. Particularly in this situation, please wait for the external legal counsel to arrive. However, given the consequences of obstructing an inspection, including the possibility of arrest, it is important to be sure of your ground before refusing access.
36. In parallel, the DRRT leader should promptly assemble the DRRT members on site, allocate responsibilities and provide a short briefing. Relevant employees should be briefed before meeting the DG officials so they are prepared to answer questions. They must respond honestly, truthfully, and based on their actual knowledge without relying on hearsay or conjectures.
37. The DRRT leader should seek to ensure that two separate large meeting rooms are booked for the day (one for the DG officials and one for the DRRT). The DG officials' room should ideally be situated away from the records room/offices of the company's key personnel. However, the DG officials may themselves decide where to sit and should not actively be prevented from accessing key information sources.
38. Before proceeding with the dawn raid, the DG officials must present two independent and respectable witnesses who are inhabitants of the locality where the inspected company's office/premises are located. Their presence and their confirmation that

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<sup>10</sup> The precise composition of the DRRT will depend on company policy and resources available. The role performed by the DRRT leader in this chapter may, of course, be performed by more than one person. In this case, there needs to be a high level of coordination during the inspection.

the search was carried out in an orderly way are recorded in the search and seizure memo (the *panchnama*), completed at the end of the dawn raid (see para 66). Any doubts on the independence of the witnesses should be raised with the DG officials forthwith, and they should not be allowed to proceed with the inspection. Likewise, if either or both of the witnesses are absent during the inspection, the DG officials should be asked not to proceed until both witnesses are present.

39. Ensure that the DG officials are at all times accompanied by “shadows” (assigned by the DRRT). The shadows should take detailed notes of all DG officials’ actions, including a record of documents, offices, computers, etc., examined. If an employee refuses to cooperate with a DG official, the shadow must immediately tell the DRRT leader. DRRT members should not argue with or impede the DG officials, even if they request potentially incriminating documents, provided these are not legally privileged (see paras 51–56).
40. Soon after the raid commences, the DRRT leader should also liaise with the internal communications team to update employees for the purpose of:
  - reassurance;
  - instructing them to liaise with the DRRT;
  - requesting them to retain documents and not delete or shred emails/WhatsApp chats/documents;
  - instructing them not to communicate internally (with other offices/departments) or externally (including family members, friends, acquaintances); and
  - instructing them to cooperate with the DG officials during their search.

### **3.2. Obligations Imposed on the Inspected Undertaking and Penalties Incurred for Obstruction or Lack of Cooperation**

41. Sections 27 and 43 to 45 of the Act enable the CCI to issue fines to companies under investigation. The penalty for non-compliance with directions under section 36(2) or 41(2) of the Act is provided under section 43 of the Act – this applies to companies as well as individuals. There are fines of up to INR 100,000 for each day (up to a maximum of INR 10 million) for failing to comply with directions given by the CCI or the DG.
42. The Supreme Court of India<sup>11</sup> has upheld that criminal penalties may also apply for failure to comply with the directions/orders of the DG/CCI (in the case concerned, criminal proceedings were initiated because of the non-payment of the penalty levied under section 43 of the Act).
43. Further, a fine of up to INR 10 million may be imposed under section 45 of the Act on companies or individuals for offences in relation to furnishing of information:
  - making any statement or furnishing any document that is false;
  - omitting to state any material fact knowing it to be material; or
  - wilfully altering, suppressing or destroying any document required to be furnished.

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<sup>11</sup> In *Rajasthan Cylinders and Containers Ltd. v Union of India* (2020) 16 SCC 615.

### **3.3. The Premises Subject to the Inspection**

44. Different offices/premises of the company, and even possibly the homes of directors or other key employees, may be raided by the DG officials. Search warrants may also cover access to employees' vehicles, whether company-owned or private.
45. It is important to check the precise scope of the search warrant. Check that the warrant contains the correct office/residential address. You do not have to allow the DG officials access to the premises if they are unable to produce a written and valid warrant/authorisation, if the address is wrongly stated or if they arrive at a different address. The DG also cannot extend searches to premises/other group companies that are not covered by the warrant.
46. Following the initiation of the inspection, the DRRT leader should escort the DG officials to the raid site (this could be an office of a particular employee or a section of the whole office). The DG officials should not be left by themselves to wander around unaccompanied at any point. Each official should be shadowed by a member of the DRRT or assigned employees throughout the inspection (see para 39).

## **4. The Search, Review and Copy of Relevant Information**

### **4.1. Searches and Copies of Documents and Data**

47. Ideally, the DG officials will identify the files they wish to review, and these should be provided to them in the room where they are seated. If possible, review the files before delivering them to the DG officials for scope, relevance and legal privilege. However, the DG officials may not accept this procedure and are likely simply to seek and look through the files they wish to review themselves. Further, the DRRT leader should seek to ensure that the examination of records by the DG officials is confined to the subject matter of the investigation stated in the search warrant (though the subject matter stated can be broad) and to non-legally privileged materials.
48. The DG officials are also entitled to search actively for information, including paper and electronic files, emails, faxes, magnetic tapes, videos, dictations, handwritten notes, diagrams, SMSes and WhatsApp chats. The DG officials will usually seize all mobile phones on arrival for the duration of the raid. The DG officials can also seize and make replicas/copies of hard drives, servers and electronic handheld devices, including laptops, tablets and mobile phones.
49. For copying information from electronic devices, the DG officials rely on forensic copying and will bring forensic technicians with them. It is recommended that the company's IT officers accompany and shadow the DG's IT technicians. If the DG officials take forensic or digital copies away with them, the DRRT leader should insist that the hard drives in which such copies are stored are sealed at the end of the inspection and that they are only opened by the CCI/DG at a meeting where the company's external counsel are present. This request should be recorded in writing. This process will allow the external counsel to make any necessary points relating to legal privilege and relevance (discussed below at paras 51–56).

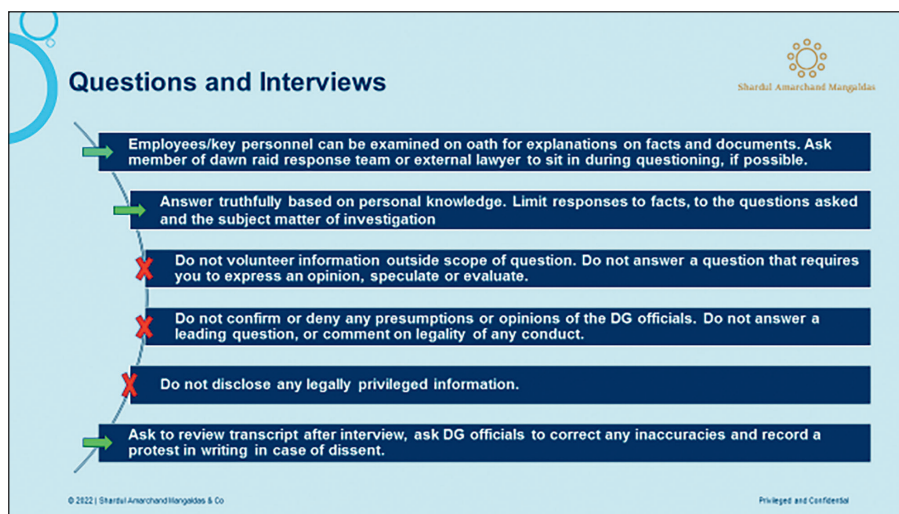
50. The DG officials can also seize and take original documents, or paper/hard copies of documents, records, etc. In such a case, object if irrelevant or privileged documents could be disclosed, and offer to identify such documents. If the DG officials refuse, seek to ensure that the documents are sealed by the DG officials at the end of the inspection for future review at a meeting where the company's external lawyers are present, and request a second copy of the seized and sealed data at such meeting. The hard copy documents should be serially numbered during the inspection, and the number of pages should be listed accurately in the *panchnama* (see para 66). Please note that the DG officials can also go through files or emails (whether hard copies or electronic) and use them during questioning of key witnesses during the inspection – the company should not obstruct or impede this process, except to raise objections for irrelevant or legally privileged documents.
51. Under Indian law, legally privileged documents are protected under limited circumstances. All communications exchanged between the company and external lawyers in the course of the provision of legal services are statutorily recognised as privileged information. However, communications between the company and the company's in-house lawyer are not privileged under Indian law.
52. Legal privilege should be claimed in relation to each individual document (including electronic documents) to which it applies. Legal privilege applies to the following kinds of confidential documents, which are created for and in the interests of the company's right of defence:
  - written communications regarding legal advice that arises within a relevant legal context between external lawyers and in-house lawyers/employees, whether or not litigation is pending or contemplated;
  - written communications obtained by in-house lawyers or company employees from third parties in contemplation of or in connection with litigation and communicated to external lawyers for litigation advice; and
  - documents brought into existence by in-house lawyers for enabling external lawyers to advise on prospects of making or resisting a claim, even if litigation has not commenced.
53. It is important to note that privilege may be lost in case legally privileged documents are shared internally within the organisation by in-house counsel/employees without the continued involvement of external counsel (for example, forwarding an email by in-house counsel to another employee without copying the external counsel and/or extracting aspects of privileged advice in internal memoranda shared within the company).
54. If the DG officials want to see a document the company considers legally privileged, the DRRT member (preferably the legal head) should explain why the document qualifies for privilege and proactively assert legal privilege on the document. If the privileged nature of a document is not clear from external indications (e.g. the letterhead or domain name of the law firm), the company may refuse to allow the DG officials even a cursory look at the document where this will immediately reveal the contents of the document. The company should give the DG officials appropriate reasons for its view in such cases.

55. A similar approach may be adopted for documents that are clearly outside the scope of the DG's investigation. If the DG officials seize private data/personal items, objection to such seizure should be recorded in the *panchnama* and appropriate legal recourse considered.
56. The company should ensure that copies of disputed documents are placed in a separate sealed envelope, marked "Legally Privileged"/"Disputed" and cross-signed by the company's designated officer, before they are taken away by the DG officials. The DG will then likely issue a formal decision rejecting the company's request for protection of the documents. The company will then have to take appropriate legal steps, such as filing an application before the relevant High Court, to establish that the documents should not be used as evidence in the investigation, owing to legal privilege or the scope of the investigation, which would then be examined by the High Court (see para 77).

## 4.2. Questions and Interviews

57. During an inspection, the DG officials may interview key personnel and record statements on oath for explanations regarding facts and documents. Preferably, the DRRT leader or a DRRT member should ask to sit in during questioning. Individuals should answer questions truthfully and fully, based on their personal knowledge, and should not speculate in responses or base them on hearsay or conjecture. Limit responses to facts, the questions asked, and the investigation's subject matter. Do not volunteer information outside the scope of the question. Refusal to answer without a valid ground could be viewed as non-cooperation and may lead to fine, imprisonment, or both. Non-cooperation with the DG may be viewed as non-compliance with the CCI/DG's directions (see para 41). It is important to remember that inspections are conducted under the provisions of the CRPC and come with attendant powers of arrest in case of non-cooperation. As such, non-cooperation could also be viewed as obstructing a public officer in discharge of its functions and invite penal sanctions (including imprisonment up to three months). Any bona fide reason for declining to answer should be clearly stated.
58. In-house counsel/external lawyers may be permitted to listen in on the examination on oath and should make careful notes. If permitted to be present at the premises, external lawyers may help prepare employees for questioning. Under current CCI practice, the right of a company to have external lawyers present during questioning is limited, though this is under challenge in the courts. While external lawyers may not be able to actively advise during questioning, they may be permitted to sit at a distance to ensure that the questioning is not oppressive and the witness is not badgered.
59. The DG officials are required to record the statements in writing. The individual whose statement has been recorded on oath should ensure that the record is correct and should ask to review the transcript. In case of inaccuracies, the DG officials should be asked to correct them before the statement is signed.
60. The questions raised by the DG officials should:
  - refer to concrete facts or specific documents;

- not be leading questions;
  - not require the interviewee to express an opinion, speculate or evaluate legal positions;
  - not require the interviewee to confirm or deny any presumptions of the DG officials; and
  - not involve the disclosure of legally privileged information.
61. If the DG officials do not conform to the above while questioning, the company should record a protest in writing. The DG officials may require answers which may involve a “confession” that the company or the individual has committed an antitrust law offence; however, the defence of the so-called right against self-incrimination for antitrust law offences is not available in India, as competition proceedings are not criminal in nature. However, under limited circumstances, such right can be invoked where a confession in India could lead to criminal sanctions in other jurisdictions.
62. It is critical for the interviewee to undertake a detailed debrief with the DRRT/ external lawyers right after the interview is over. This is important for the company to determine its defence strategy following the raid, including whether it wishes to file for leniency or contest the allegations.



### 4.3. Seals

63. The DG officials can seal business premises and books or records for the period of inspection and to the extent necessary for the inspection to be completed properly. Seals are important as they ensure that information that the DG officials want to examine is not tampered with overnight. They can secure rooms, furniture, boxes, files, etc., with seals.
64. If the seals are broken or tampered with, the inspected company and its employees may pay a heavy penalty (see para 41). Therefore, it is advised that security



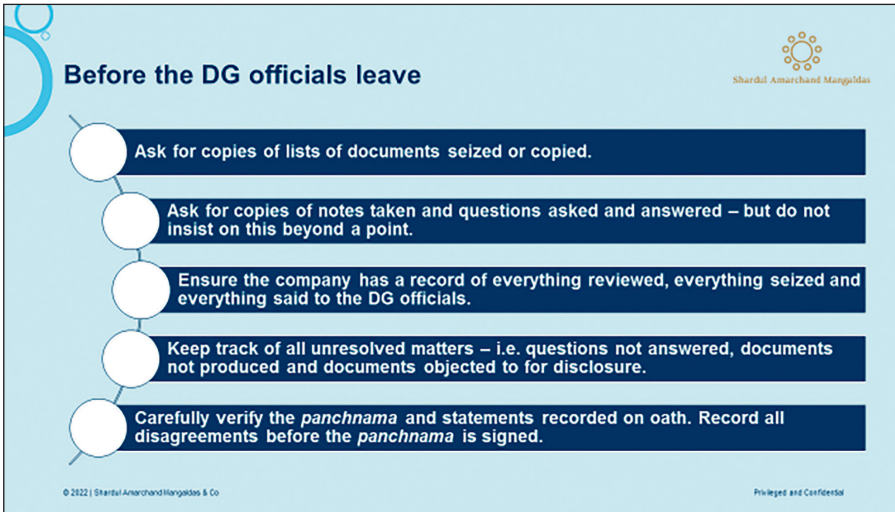
guards monitor the sealed locations and ensure that seals are not tampered with in any manner. Care should also be taken that cleaning/maintenance staff do not inadvertently break seals.

#### 4.4. Minutes

65. Dawn raids can last for several hours and even days, and the DG officials can seize a large amount of material. Before the DG officials leave the premises, the company must ask them for copies of lists of documents copied or taken, and must have its own record of everything reviewed and statements made. If the DG officials do not share a copy of the statements, the DRRT member present in the interview and the interviewee should ask to read it once again before the raid is concluded. The company must make sure to keep track of all unresolved matters, for example, questions that have not been answered, documents that cannot be produced, and documents over which legal privilege has been claimed. Each person in the DRRT should report to the DRRT leader and a compilation made of all issues or questions asked by the DG officials.
66. After the completion of the dawn raid, the DG officials are required by law to prepare a record of the inspection, which includes a list of documents/electronic data seized and brief details of the statements made on oath. This is the *panchnama*, which must record the proceedings of the raid briefly and accurately and should be signed by the two independent witnesses, the designated officer of the company and the lead DG official. The DRRT leader should ensure that the documents and/or electronic data seized are properly described, that the hard copy documents are serially numbered in their presence, and that the number of pages is listed in the *panchnama* to ensure there is no tampering later. The DRRT leader must carefully verify the contents of the *panchnama*, requesting any changes in case of inaccuracies before it is signed by the designated officer of the company.
67. If any disagreements are not recorded in the *panchnama*, the designated officer of the company should consider declining to sign. Alternatively, make a contemporaneous separate note/letter of protest recording the disagreements with the DG officials, signed and time-stamped by the person signing the *panchnama*, and provide it to the lead DG official before they leave.
68. Additionally, the DRRT leader must make a written internal record of the inspection for the company's senior leadership on details of documents/records seized, questions asked during the raid, confidentiality claims in relation to seized documents/records, areas of disagreement, instances where the company has reserved the right to challenge the DG officials' authority (on the grounds of either legal privilege or the scope of their authority). This document should be signed by the company's designated officer. The company should seek to provide a copy to the lead DG official for the DG's file, but the DG official may refuse to take it. It is thus important to ensure that the *panchnama* capture all disagreements/issues.
69. In the event that the DG officials have taken hard copy printouts of electronic data, they may request an affidavit to be signed under section 65B of the Indian Evidence Act, 1872. This affidavit is mandatory for the admissibility of secondary evidence produced by an electronic record, and enables the DG to place reliance on the



printouts as evidence. It is important to ensure this affidavit is signed by the IT head and not the MD/CEO, as the IT head is the guardian of the company's IT systems.



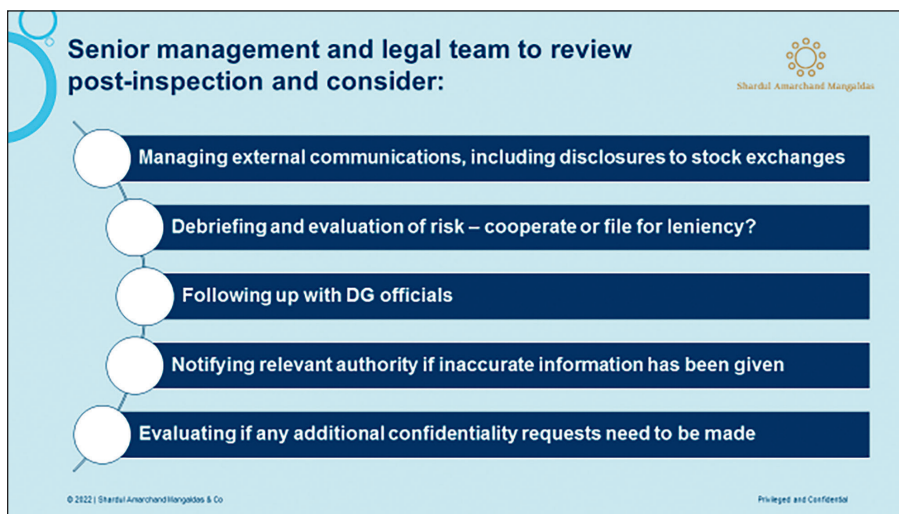
**Before the DG officials leave**

Shardul Amarchand Mangaldas

1. Ask for copies of lists of documents seized or copied.
2. Ask for copies of notes taken and questions asked and answered – but do not insist on this beyond a point.
3. Ensure the company has a record of everything reviewed, everything seized and everything said to the DG officials.
4. Keep track of all unresolved matters – i.e. questions not answered, documents not produced and documents objected to for disclosure.
5. Carefully verify the *panchnama* and statements recorded on oath. Record all disagreements before the *panchnama* is signed.

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70. Once the *panchnama* is signed, the DG officials will seal all the seized records, documents, copied hard drives, etc., in the presence of the company officials. This sealed box/cloth bundle should be cross-signed by the lead DG official and the designated company officer to ensure it is not tampered with before it is later opened in the DG office, in the presence of the signing company officer and the external counsel of the company.
71. After the inspection has ended, the DRRT should organise a full debrief to cover the finalisation of the company's minutes, the first review of the material seized, questions asked during any interviews (including details of the documents the interviewees were confronted with) and an initial risk assessment. In case any inaccurate or contradictory statements come to the DRRT's notice, notify these to the DRRT leader immediately for further action.
72. The company should manage external communications, including any stock exchange/regulatory disclosures, to get in front of any news on the raid.
73. The company and its representatives should also follow up with the DG officials to fix a time for the seized materials to be opened in the presence of external lawyers and the designated company officer who signed the *panchnama*.
74. Lastly, the DRRT should prepare a detailed report of the dawn raid for management, including a record of when the DG officials arrived, the checks performed on the warrant and their IDs, the names and details of the independent witnesses accompanying the DG officials, details of all contacts with employees, all documents (including electronic records) copied and seized by the DG officials and all answers given to questions raised by the DG officials. This will help in the process of establishing what the dawn raid was seeking to achieve and how the company should respond. It will also highlight if any immediate follow-up action needs to be taken with the CCI/DG.



#### 4.5. Continued Inspections

75. As the DG is authorised to search the premises and seize any relevant information, dawn raids may last for a day or two. All the material seized by the officials of the DG must be sealed, and the inspected party must insist that these be opened only in their presence in the DG office and a copy of the material seized provided to it (or the originals be returned). After this, the DG will continue indexing, searching and/or reviewing the data collected during the on-site inspection as part of its investigation. In searching for evidence, the DG will typically conduct electronic searches on the data/records seized (which sometimes includes entire mailboxes of key employees), including word searches, searching by names, terms, keywords/ codes or topics depending on particular suspicions.

#### 5. Judicial Review

76. There is no statutory provision in the Act that allows a challenge to the legality of an inspection decision itself, which is granted by the CMM. A raided party can only challenge non-compliance with due process or violation of natural justice rights during a dawn raid by resorting to writ proceedings before the relevant High Court in India. In case such a challenge is allowed, the CCI/DG would be restrained from using the impugned part of the material seized, statements recorded and information collected during a dawn raid.
77. Further, the review of the material seized, statements recorded and information collected during a dawn raid is not subject to any judicial review. However, in case of seizure of legally privileged information or irrelevant information, there are ways to protect such information from the scrutiny of the CCI/DG (as discussed above). It is critical that legal privilege/relevance be asserted during the dawn raid or as soon as reasonably possible after the raid, and contested documents are placed in a sealed cover. It would be difficult for the company to mount a legal

challenge if the *panchnama* has been signed without such protest/qualification, as the CCI/DG will argue that the company was happy that the inspection was conducted in accordance with law. If the company has appropriately asserted its rights, it can file an application before the relevant High Court seeking to prohibit the CCI/DG from relying on such information if it can prove that the documents are indeed covered by legal privilege or are not within the scope of the authorised investigation.

# Competition Inspections in 21 Jurisdictions

## A Practitioner's Guide

Nathalie Jalabert-Doury

Foreword by Paul Nihoul



This is the third volume in this series. The first volume addresses inspections in France, and the second volume addresses the European Union.

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