

# Competition Law Hotline

April 16, 2014

## MORE POWERS TO DIRECTOR GENERAL UNDER THE COMPETITION (AMENDMENT) BILL, 2012

- Director General, will now only need the approval of the Chairperson of the CCI to initiate 'search' and 'seizure' procedure for conducting investigation instead of obtaining prior approval from the Magistrate of the relevant jurisdiction.
- The proposed change empowers the DG to search places, seize documents and even record statements of people on oath thereby expediting the investigation process.
- The discretion conferred on the DG although wide is well within the permissible limits as prescribed under other statutes in India.

The Competition (Amendment) Bill, 2012 ("Bill") introduced in the Lok Sabha on December 10, 2012 proposes to enable the CCI to conduct 'search' and 'seizure' operations through the Director General ("DG") after authorization from the Chairperson. The Bill for the first time has provided three grounds for the satisfaction of DG, before he seeks authorization from the Chairperson. If in a particular case, the DG has '*reason to believe*' that a party has not provided information within its possession or that it would be destroyed, subject to certain conditions precedent, an authorization may be sought from the Chairman for conducting investigation.<sup>1</sup> As per the new Bill, the DG may enter the place where the information may be kept; search such a place; seize the documents and take copies of information in any media and even record on oath statements of persons having knowledge of the information.<sup>2</sup> Additionally, it is proposed that the provisions of the Code of Criminal Procedure, 1973 ("CrPC") shall apply with respect to such searches and seizures.<sup>3</sup>

Section 41 of the Competition Act, 2002 ("Act") empowers the DG to investigate contravention when directed by the Competition Commission of India.<sup>4</sup> ("CCI") It further states under subsection (3) of Section 41, that Sections 240 and 240A<sup>5</sup> of the Companies Act, 1956 ("Companies Act"), shall apply to the investigations made by the DG or any other person investigating under his authority, as they apply to an Inspector appointed under the Companies Act.

This is a significant departure from the existing procedure, wherein, under Section 41(3) of the Act, the DG was required to obtain an order from the Magistrate of relevant jurisdiction in order to conduct 'search' and 'seizure' operations.

## COMPARATIVE ANALYSIS-EXISTING POWERS OF THE REGULATOR IN OTHER JURISDICTIONS

### Jurisdiction Details

USA	The Commission's specific investigative powers are defined in Sections 6, 9, and 20 of the FTC Act, 15 U.S.C. Sections 46, 49, and 57b-1, which authorize investigations and various forms of compulsory process. <sup>6</sup> Application for the search warrant has to be made before a magistrate in the judicial district where the property is located. <sup>7</sup> It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. <sup>8</sup> This rule rests upon the desirability of having magistrates, rather than police officers, to determine when searches and seizures are permissible and what limitations should be placed upon such activities. <sup>9</sup>
UK	Search and seizure can be conducted either with or without a search warrant. Under Section 27 of the UK Competition Act, 1998, The Office of Fair Trade ("OFT") Officer has the power to carry out inspections without a warrant after getting the necessary authorization from the Director of the OFT, but a two working days' written notice has to be given to the occupier of the premises indicating the subject matter and purpose of investigation. <sup>10</sup> However, Section 28 of the Act provides for the power to enter premises with a warrant, after an application has been made by the Director to the Court, wherein a judge may issue a warrant after being satisfied that there are reasonable grounds for suspecting availability of document on premises.
Brazil	The General Superintendent may request the Judiciary to issue search and seizure warrant for objects, papers of any kind, as well as business books, etc. and in the interests of administrative investigations or administrative proceedings to impose administrative sanctions for violations to the economic order.
South Africa	The Competition Act, 1998 (No. 89 of 1998) of South Africa provides for search under Chapter 5 (Competition Tribunal Procedures). Section 46 provides that a judge of a High Court, a

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regional Magistrate or a Magistrate who has the authority to issue a warrant to enter and search any premises within its jurisdiction. However, Section 47 states that an inspector may even conduct a search without a warrant (except for a private dwelling). The powers to enter and search has been extensively provided under Section 48 of the Act authorizing the person to enter, search, examine, take information, etc.

In light of the 'search' and 'seizure' powers, as available, in the jurisdictions more specifically mentioned above, it appears that the proposed amendment will confer a wide discretion on the DG, which is not otherwise available in other jurisdictions, in terms of issuing a 'search' and 'seizure' order without obtaining the necessary warrant.

#### POWER WITH OTHER REGULATORS IN INDIA

The power sought to be conferred on the DG is common under other laws in India. Other regulators such as Security and Exchange Board of India ("SEBI") and Income Tax ("IT") Authority have been vested with such powers.

#### SEBI

A provision similar to Section 41 of the Act was present under the Securities and Exchange Board of India Act, 1992 ("SEBI Act") wherein the Investigating Authority was required to make an application to the Judicial Magistrate of the First Class having jurisdiction to order seizure of such books, registers, other documents and records.

However, this has been amended by The Securities Laws (Amendment) Second Ordinance, 2013<sup>11</sup>. Now, the Investigating Authority is required to seek the authorization of the Chairman for entering premises, conducting search and seizure and even record on oath the statement of any person.<sup>12</sup> Post amendment in 2013, the only difference between the provisions of the SEBI Act, 1992 and the Bill, lies in the manner in which such search and seizure shall be conducted. While the SEBI Board is entrusted with the responsibility to make such regulations<sup>13</sup>, however, under the Bill the provisions of the CrPC shall apply.<sup>14</sup> It must be noted that, just like the proposed provision of the Bill the SEBI Act, 1992 also refers to the satisfaction of the Investigating Authority on similar grounds before he makes an application for investigation under Section 11C(8).

#### Income Tax Act

A parallel can be found under Section 132 of the Income Tax Act, 1961 ("Income Tax Act") which empowers certain IT authorities to carry out search and seizure. The question with respect to arbitrariness of the power conferred under Section 132 was challenged in *ITO v Seth Bros*<sup>15</sup> wherein the Supreme Court made it clear that Section 132 does not confer any arbitrary authority upon the revenue officers. It was pointed out that the Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. Further, it was also held that if the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court.

The constitutionality of Section 132 was considered by the Supreme Court in *Pooran Mal v. Director of Inspection (Investigation) Income Tax*<sup>16</sup>, where the Supreme Court held that the provisions relating to search and seizure do not violate Articles 19(1)(f) and (g) because the restrictions placed therein are reasonable restrictions and also that it was impossible to hold the aforesaid provision in violation of Articles 14, 19 or 31. Further, it may not possible or desirable to give notice or prior hearing to the person concerned before a search or seizure is carried out; the absence of such notice cannot be said to violate Article 19(1)(g)<sup>17</sup> of the Constitution.<sup>18</sup>

#### ANALYSIS

By replacing the requirement to seek prior sanction from the Magistrate and substituting it with a requirement to seek prior sanction from the Chairperson of CCI, the Bill makes it easier for DG to carry out *dawn raids*.<sup>19</sup>

The three grounds mentioned in the proposed Section use the expression 'reason to believe' which has a wide connotation and confers wide discretion on the DG. The power 'to act' or 'not to act' in one way or other is called 'Discretionary power'. 'Discretion' is the power to decide or act according to one's judgment. Lord Diplock

in *Secretary of State for Education & Science v. Tameride Metroborough Council*<sup>20</sup> has defined discretion as 'the very concept of administrative discretion involves a right to choose between more than one possible courses of action upon which there is a room for reasonable people to hold differing opinion as to what may be preferred'.

The expression 'reason to believe' is found in the above discussed provisions of the SEBI Act and the Income Tax Act. The expression 'reason to believe' has evolved innumerable judgments of the Supreme Court of India ("Supreme Court"). It has been held in *CIT v Tarsem Kumar*<sup>21</sup> that, the expression 'reason to believe' does not refer to the subjective satisfaction of the IT authorities. It postulates belief and existence of reasons for that belief. The Supreme Court also held in *ITO v Lakhmani Mewal Das*<sup>22</sup>, the words 'reason to believe' postulate belief and existence of reasons for that belief. The belief must be held in good faith. It cannot be merely a pretence; it does not mean a purely subjective satisfaction of the officer. The belief must not be based on mere suspicion; it must be based upon information.<sup>23</sup>

As seen above, the powers of the DG under the Act, is not very different from the powers of SEBI's investigative authorities or that of the Income Tax Authorities. The constitutionality of a similar provision under the Income Tax Act has already been upheld by the Supreme Court. Under India's law, there is a general presumption in favor of constitutionality of conferment and exercise of such powers. Principles of reasonableness are incorporated in India's general law. A party that seeks to challenge conferment of powers or the exercise of the same will have to show that there is an element of unreasonableness or arbitrariness in the provision. Thus, the burden is on the person challenging it to show that the impugned provision is unconstitutional.

The proposed amendment will facilitate CCI in investigating cartels and other anti-competitive conducts, as it will enable the regulator to act independently and efficiently, since the CCI Chairman is proposed to take over the responsibility of authorizing such tactics, without any interference from the judicial authorities.

Going forward, once the amendment comes into force, companies will have to be careful in replying to show cause notices, issued by the CCI. If the DG is not satisfied or has 'reason to believe' that adequate information has not been provided or that there is apprehension that the information in possession would be destroyed, an

authorization may be sought from the Chairman for conducting investigation. This may lead to serious consequences for the company as DG will have the power to enter the place where the information may be kept; search such a place; seize the documents and take copies of information in any media and even record on oath statements of persons having knowledge of the information.

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You can direct your queries or comments to the authors

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<sup>1</sup> Clause 41(3), Bill

<sup>2</sup> Clause 41(3)(c), Bill

<sup>3</sup> Clause 41(4), Bill

<sup>4</sup> Section 41(1), Act

<sup>5</sup> Section 240 and 240A of the Companies Act, 1956 deals with 'Production of documents and evidence' & 'Seizure of documents by the inspector' respectively.

<sup>6</sup> <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>

<sup>7</sup> Antitrust Division Manual, 5<sup>th</sup> editions, Chapter-III – Investigation and case development, pg. III-90, available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>

<sup>8</sup> Carroll v. United States, 267 U. S. 132 (1925)

<sup>9</sup> Trupiano v. United States, 334 U.S. 699 (1948)

<sup>10</sup> Only business premises can be searched without a warrant and the requirement of two working days written notice could be exempted in certain circumstances.

<sup>11</sup> The Securities Laws (Amendment) Ordinance, 2014 of March 28, 2014

<sup>12</sup> Section 11C(8), SEBI Act, 1992 (as amended by The Securities Laws (Amendment) Ordinance, 2014)

<sup>13</sup> Section 11C(9), SEBI Act, 1992 (as amended by The Securities Laws (Amendment) Ordinance, 2014)

<sup>14</sup> Section 41(4), Bill

<sup>15</sup> (1969) 74 ITR 836 (SC)

<sup>16</sup> AIR 1974 SC 348

<sup>17</sup> Article 19(1)(g) – All citizens shall have the right to practice any profession, or carry out on any occupation, trade or business

<sup>18</sup> Chemitex v Union of India (1982) Tax LR 2877 (Gau)

<sup>19</sup> Dawn raids are conducted by the officials early in the morning in order to have an element of surprise on the person /entity being raided. This surprise element aids in preventing entities being raided from destroying, concealing or altering information that would otherwise provide the authorities with information that they might need in connection with their investigation. Dawn raids are resorted to especially in circumstances where evidence to prove a concerted action is lacking.

<sup>20</sup> [1976] 3 W.L.R. 641 (H.L.)

<sup>21</sup> (1986) 161 ITR 505 (SC)

<sup>22</sup> (1976) 103 ITR 437 (SC)

<sup>23</sup> N K Textile Mills v CIT (1966)

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