

EU & COMPETITION

Being subjected to the scrutiny of EU competition officials is an experience every company wants to avoid. **Catriona Hatton and George Metaxas** offer advice on what to do if the European Commission knocks at the door

Dawn raiders

Without commenting on the rights or wrongs of the case, the European Commission's (EC's) recent dawn raid on Intel's Brussels office during its inquiry into alleged anti-competitive practices has highlighted the need for international companies to be aware of the European Union's (EU's) powers in this area.

The Commission is entitled to carry out investigations at a company's premises if it suspects it has taken part in an infringement of EU competition rules, such as a cartel to fix prices or to share markets.

These may be held at very short notice — sometimes with no notice at all, hence the over-dramatic term 'dawn raids'. Commission visits may start later in the day, but on-the-spot investigations do represent a disturbing event in a company's life, can have serious consequences and must be treated with the utmost seriousness.

Commission dawn raids are typically triggered by third party complaints or, more often, a cartel member's application for 'leniency' (exemption from any fines) in exchange for information on a cartel. In such cases, the EC officials knocking unannounced at a company's premises know what they must look for; they are not there for a routine fishing expedition.

When carrying out an investigation, the EC officials can examine the books and other business records, take or obtain in any form copies of, or extracts from, the investigated company's books and business records and ask for oral explanations on the spot.

The examination of books and business records is a very wide concept. It includes any correspondence, memoranda, diaries, electronic data carriers and e-mails in relation to the subject matter of the investigation. The company is obliged to assist the officials in finding the documents required. This extends to confidential information, with the exception of documents that are legally privileged — correspondence between the company and an outside lawyer registered at a bar in one of the EU member states — provided that such correspondence relates to the subject matter of the investigation. The protection of legal privilege does not apply to documents that emanate from in-house lawyers; and the status of communications from external lawyers that are not registered in an EU member state is, at best, uncertain.

EC officials will routinely copy a company's electronic records (including diskettes and hard disks) and have the technical expertise and

means to recover supposedly deleted documents, e-mails and other data from such carriers.

Since May last year, EC officials have gained further powers to seal premises for the period and the extent necessary for the investigation, interview any person for the purposes of collecting information in relation to the subject matter of the investigation and enter private homes when there is a reasonable suspicion that books and other business records are kept there.

The EC has a power of investigation, but no automatic right to search. If it finds or suspects a refusal to co-operate, (an unwise and hence rare response by a company under investigation) it must seek assistance from the member state concerned. Typically, the local competition authority co-operates closely with the Commission prior to and during its investigation. Officials from the national competition authority routinely accompany the EC officials in dawn raids and other investigations.

Antitrust compliance programmes are part of any multinational or other large company's to-do list and can significantly reduce the risk of antitrust infringements. As part of this programme, it is also advisable to address the 'what if' scenario of an EC investigation — even where a company's management is not aware of any cause for concern.

Guidelines for 'what if' scenario of an investigation

Set up a key team. The core of the key team should be composed of (i) the outside lawyer, (ii) the in-house lawyer and (iii) an executive who has a thorough knowledge of the overall activities and structure of the company.

Staff briefing. Other staff members need to be briefed particularly in view of the upcoming possibility that the EC officials may interview anyone. It is also useful to brief the receptionist so that she/he knows where and to whom the officials should be directed.

Review the document retention policy. Each member of the key team should be able to quickly locate the requested documents/information and arrange access to files/computers. Otherwise, the investigation could quickly degenerate into a 'fishing expedition'. Review in advance any potentially sensitive documents (also including e-mails, hand-written notes and other records).

Centralise all privileged documents in one place. It is essential that privileged documents are not scattered around the different



departments, but centralised in one location.

Protect privileged correspondence against risk of disclosure. In particular, outside counsel should avoid sending legal opinions directly incorporated in the text of an e-mail. Since non-EU lawyers are not covered by legal privilege under EU law, legal advice on EU competition law sent by law firms that are not registered, as a firm, with an EU bar, should at least emanate from those lawyers in that firm who are individually admitted to practise in the EU, even if the advice was actually drafted by a non-EU lawyer of the firm.

What not to do during the investigation

- Delay the investigation by making the officials wait unnecessarily in the conference room on their own;
- Refuse to produce, destroy or remove documents; leave the officials alone or let them go through the data without any control or assistance — the officials do not have a right to request their unaccompanied access to the company's files;
- Be abrupt or aggressive, or make false factual statements or show the content of a legally privileged document.

What to do during the investigation

- Co-operate, regardless of the circumstances of the investigation;
- Request an explanation from the European Commission officials and check that the authorisation sets out the purpose and subject matter of the investigation;
- Refuse to provide documents/information not related to the subject matter of the investigation and contact your outside lawyer immediately;
- Immediately contact and organise an internal meeting with the members of the key team;
- Convey a quick meeting of the staff members who may be involved in the investigation and

remind them of the rights and obligations of the company;

- Designate at least two members of the support staff (preferably the executive's secretary) to be at the disposal of the officials, make copies for them and keep a record of the documents/information consulted by the officials;
- Make sure that a conference room has been booked for the officials and that a photocopier is at their exclusive disposal;
- Never leave the officials alone;
- Always take a spare copy of all documents copied by them;
- Indicate to the officials which documents are of confidential nature;
- Keep a record of the interview session;
- Consider internally, on a top management level, whether you should apply for leniency.

After the investigation

- Review all materials inspected by the EC;
- Correct any incomplete or inaccurate document production or oral responses;
- Review all documents provided for business secrets;
- Expect additional documents requests and questions;
- Prepare a press release to inform shareholders and stakeholders.

Last, but not least, applications for leniency are these days a routine part of any cartel investigation in the EU and elsewhere. In the EU, a company's potential benefits from a leniency application will tend to decrease rapidly after a dawn raid. The more information the EC obtains on a case, the lower the potential fine discounts for latecomers in the leniency application process.

It is therefore essential for any company under investigation in a cartel case to assess as quickly and early as possible the pros and cons of a leniency application and to respond accordingly.

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