

Dawn Raids: Some practical advice for the general counsel

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PRIVATE AND CONFIDENTIAL

Introduction

So much of the advice on handling competition law dawn raids describes what businesses should do when one occurs. Very little attention is usually paid to the mistakes which businesses make and what not to do during a dawn raid. This short article therefore sets out the “dos and don'ts” and considers the issue temporally: before, during and after the inspection.

Before the inspection

Explain the risk of an inspection to key personnel

A competition law dawn raid on a business is often a traumatic event for the personnel of the inspected undertaking or association of undertakings. If there is a raid and the management have not been briefed in advance then questions could be asked of the general counsel as to why nobody warned the board and the executive team of the risk and what it meant in practice. It is therefore prudent for the general counsel to explain to the board and the executive team the purposes of the inspection and what can happen (including how intrusive and disruptive it can be to have inspectors in one's business for several days and the divisive suspicions which can arise – rightly or wrongly – among the management team). Such a briefing can also help the general counsel to get the attention of management and the necessary resources for the task of dealing with inspections.

Read the rules well in advance

The general counsel should read the rules in advance, as there will be not be enough time to go through the documentation on the day. Too many undertakings compile the rules and even have a compliance manual prepared by external counsel but key executives of the undertakings (for example, the general counsel) do not read the rules in advance. It would be wise for a general counsel to take a day out to read the rules in advance (including explanatory notes and guidance) – good preparation “in peacetime” helps “in battle”.

Conduct training

It is critical to train several people in the organisation to be able to deal with inspections. This is not only to deal with a situation where the general counsel is away when an inspection occurs but also where several teams are needed (for example, where several premises are inspected). Having several people well trained also helps everyone on the day because they appreciate more fully what is involved and can explain the process to colleagues. The training should cover not only the procedural dimensions but also the substantive rules. It should also explain the psychological aspects (for example, how a dawn raid can be an invasive procedure and that an employee's personal property on the premises – such as a mobile phone – can be reviewed). During an inspection, there can be mini-skirmishes when, for instance, inspectors wish to seek to gain access to personal information and property. There can be moments of tension and aggression. With employees having personal mobile phones and personal property on business premises, there is the opportunity for tense interactions (for example, “why are they looking at emails from my child?”). Training should cover every relevant party in the organisation. It is tempting to train only senior executives but others need to be included. For example, personnel in reception, IT and corporate affairs need to be briefed as they can be very important on the day. Moreover, training to all should be updated regularly to deal with changes in the law, personnel and office locations.

Take a practical and measured approach to the drill to be followed

Instead of trying to teach first aiders everything about medicine, it is better to provide them with key tips and instinctive reactions. So, too, with the inspection process. It is important that those involved in the process have a practical and measured approach to the drill to be followed.

Don't over-prepare

Some businesses over-prepare and try to legislate for every possibility. There are manuals which are the size of a dull Victorian novel. It is best to avoid trying to deal with every possible permutation. In fact, no two inspections are ever the same. Equally, each inspection has a different rhythm so it is best to be flexible and agile. Moreover, this is a manual or a toolkit (which might be an online video or game) and not a mini legal textbook. Many general counsels write manuals which would get good marks from their old professors but few marks from the intended audience.

Don't over rely on technology

Many law firms have developed smart apps on how to deal with dawn raids. Some undertakings have emulated the idea. In principle, they are a great idea. In practice, they do not work as well as one might imagine. Knowing that they have an app, many executives will not read the advice in advance of an inspection but assume that they can review it on the day of a dawn raid. In practice, one of the first devices which is seized from relevant personnel is their smartphones. Even if executives seek to access their phones to read the advice, phones are sometimes out of use while they are being copied and searched electronically. Moreover, there is often no "technologically-neutral resource" (ie, a paper copy) of the guidance.

The inspection

In essence, if an inspection occurs then the general counsel should take charge, not panic, call external counsel, inform management and corporate affairs, mobilise the internal team, follow internal protocols and ensure that key internal messages are communicated.

Check the parameters of the inspection

It may seem like an utterly basic principle but it is important to check that the warrant and/or decision relates to the correct undertaking or association of undertaking and that the address is correct.

Calm leadership

When leading the dawn raid team, the general counsel needs to show calm leadership. Calmness is critical. Some of the employees will be disturbed. It is also critical to establish who in the organisation is "in charge" or "taking leadership" during the inspection. Ideally, this needs to be someone who understands the dawn raid process. It would be best if the leadership hierarchy in the organisation could be agreed in advance so that no time is wasted on the day. There are advantages to the general counsel taking charge because of his or her knowledge of the process.

Identify the agency and its powers

If an inspection happens, identify the specific agency which is conducting the investigation. There can be two agencies present; for example, the European Commission and the relevant national competition agency (NCA) acting in support of the former, but the European Commission is the agency conducting the inspection so it is using its powers under Regulation 1/2003, rather than the NCA's powers. The national police force may also be present. Always ask which agency is conducting the inspection and establish which powers are being deployed.

Not all inspections are the same. Moreover, the powers of different agencies differ. Some agencies have the power to take away original documents while the European Commission may only take copies. Establish whether the inspection is a compulsory or voluntary one. If it is compulsory then resistance can result in penalties. If it is

voluntary then a careful decision needs to be taken as to whether to proceed or not; the general counsel should take advice and have all the relevant people in the organisation take the decision – a decision which could have serious implications, for example, a voluntary visit which is denied might well be followed by a compulsory one. Fines and/or imprisonment for obstructing are also possible; *KWS v Commission* involved a case where the fines were increased by 10 per cent due to KWS denying Commission officials entry to its premises for 47 minutes pending the arrival of external competition counsel.

Count and verify the inspectors

When the general counsel contacts external lawyers, the counsel should be able to convey at least five items of data: (a) the entity or entities being inspected; (b) the agency conducting the inspection; (c) how many inspectors there are; (d) the location(s) which are being inspected; and (e) contact details for the location, the general counsel and others. Before calling the external lawyers, count the number of inspectors, verify (and copy) the identity cards of each inspector. Check the warrant and the identity cards – the general counsel may need to be firm if there is any disparity. It is important to know what is involved. For example, if the European Commission is conducting the inspection then is it: (a) a request for information under Article 18 of Regulation 1/2003; (b) a power to take statements under Article 19 of Regulation 1/2003; (c) a power of inspection under Article 20 of Regulation 1/2003; (d) a power of Inspection of Other Premises under Article 21 of Regulation 1/2003; or (e) an investigation by competition authorities of member states under Article 22 of Regulation 1/2003?

Identify the subject matter of the inspection

It is very important for the general counsel to identify the legal and factual subject matter of the inspection. For example, if the inspection relates to an alleged anti-competitive arrangement then other undertakings and even an association of undertakings could be inspected at the same time. Inspections relating to alleged abuse of dominance and state aid may be of a lesser scale. The inspection could be part of a sectoral inquiry (see Article 17 of Regulation 1/2003). It is important for the general counsel to have a sense of the subject matter and parameters of the inspection. It is prudent for the general counsel to advise colleagues not to contact counterparts in other organisations – this is a time to be on one's own.

Don't have too big a contact list

The general counsel should have a list of the people who need to be contacted if there is an inspection. A common mistake by some organisations is that their "contact list" is excessively long. It may not be easy to find all of these people on a "normal" day, never mind during a dawn raid. An association of undertakings (for example, a trade or professional association) has to be careful to ensure that its members are informed fully.

Take detailed notes

The general counsel should note down everything that is said (and not said), copied and seized. Record the timings of such events. It is often useful to have someone accompany the general counsel to take notes. Such notes could be useful in any litigation.

Duration of the inspection

One of the most common questions by the client on an inspection is "how long will the inspection last?" The short answer is that no one knows. It is best to assume that it could take a few days. Typically, even the inspectors do not know at the outset how long the inspection will last. As the process develops, inspectors will give certain signals (eg, express a desire to wrap up the downloading and copying of data by a certain time or day) and may confirm the timetable late in the inspection. Assume the inspection will endure – it may last longer than a day.

Who is the external counsel representing?

It may seem like a strange question but who is the external lawyer representing? The company has called the external lawyer. This means that the external lawyer is representing the company and not necessarily the company's employees or third parties – this is particularly important where the applicable regime has personal (as well as corporate) liability). Therefore, the general counsel needs to bear in mind that the employees may need to seek separate legal advice. This needs to be managed carefully.

Interviews

Oral explanations may be sought by the competition agencies as part of the inspection. It is important to advise the executives and staff on how to deal with interviews. In particular, potential interviewees should appreciate how to understand the questions which they are being asked and how they should answer those questions truthfully and appropriately. Lawyers should be present throughout the questioning. Take a note of the answers. Be careful about any refusal to answer or any sign of giving incorrect or incomplete answers. Keep answers short, relevant and factual. The general counsel should have internal and external counsel present at all interviews. Executives should be careful to ensure that any interaction, however casual, with the inspectors does not lead to unfortunate disclosures. All executives should be advised of their right to legal representation and should not interact with inspectors without legal representation.

Privilege issues

It is important the general counsel has briefed staff about issues relating to legal professional privilege and the privilege against self-incrimination both as part of training and at the beginning of the inspection. Before any inspection occurs, it is useful for the general counsel to review the organisation's records of legal advice so as to ensure that it is separated into external legal professional privileged advice and other forms of advice. In those jurisdictions where internal legal professional advice is privileged then that should also be separated if there is a national inspection. If there is any dispute about privileged documents then they can often be put into a sealed envelope and then submitted to a relevant party (eg, a judge or independent lawyer) for further review.

Recognise nervousness

During inspections, there are often nerves on all sides. Some inspectors are nervous because they do not know what is facing them and what resistance they could encounter, while the entities inspected are often in a state of shock and are also nervous. It is important to bear in mind the level of anxiety which is involved and deal with the situation appropriately.

Be conscious of the stages

Many of those inspected go through the stages of grief and shock and there can be a sense of denial at the outset. Moments of anger may occur and there can even be bargaining. There can occasionally be moments of depression. Eventually, there could be acceptance but it is not inevitable. In particular, the general counsel can be as much a psychologist as a lawyer during the process.

Information technology

Information technology (IT) plays a critical role in inspections, so it therefore helps if the general counsel has briefed the IT team and any external service provider in advance as part of training. The IT teams needs to understand fully what is involved in an inspection including the need for urgent and accurate responses.

There should be a lawyer present throughout the process.

During an inspection, the agency's team often simultaneously asks several different tasks of the IT team. Record all the requests on a white board or flipchart so that everyone can see what has been requested, and photograph the task list regularly. An inspector may become impatient if their requested task is not completed so it is best to have a log so that the inspection team as a whole can see how matters are progressing.

There are various practical IT issues which arise, among which is the non-availability of passwords. There can also be shared drives which give access to the records of other businesses including those which are not the subject of the inspection. Therefore, steps need to be taken to ensure that there are suitable limitations and restrictions placed on the access to data of undertakings outside the scope of the inspection. Some of the data could be stored or managed offshore so general counsel and the IT department need to coordinate such relationships during the inspection. IT helpdesks need to be told not to re-open the email accounts of executives which have been shut down. This means that outsourced service providers may have to be contacted. Given the fact that fines of €2.5 million were imposed in *EPH v Commission*, IT issues are critical.

Handle publicity carefully

Many inspections are unpublicised – at least, immediately. Do not publicise the inspection unless there is good reason. If several businesses are being inspected, do not be the first to “go public” but rather slip into the background. It is important that publicity is accurate and not dramatic (eg, the word “inspection” is preferable to “a dawn raid”).

Protect seals

If the Commission (or any other agency) seals premises then maintain the seal at all costs. E.ON was fined €38 million for a suspected breach of a seal during a dawn raid. E.ON's explanations were not accepted. Even the €8 million fine on *Lyonnaise des Eaux* would be unpalatable. So, it is important that security is instructed (or hired) to protect the sealed areas.

Know the inspectors' powers

The general counsel should be aware of the powers of the particular inspectors. For example, the Commission may: (a) enter premises (including homes) and means of transport; (b) examine books and records related to the business (irrespective of the medium on which they are stored); (c) take or obtain (in any form) copies of (or extracts from) books or records; (d) seal any premises; and (e) ask any representative/member of staff for explanations on facts or documents relating to the subject-matter/purpose of the raid. By contrast, some agencies may take away originals. It is critical that the general counsel and the team handling the inspection know exactly the powers of the inspector and check that they are not exceeded.

Immunity and leniency

Despite the inspection being underway, the general counsel should consider the opportunity for seeking immunity and leniency. It may not be too late to seek immunity or leniency and therefore the general counsel should know the rules in advance but also establish quickly the nature of any breaches.

Inspection wrap-up

There is usually a wrap-up debriefing at the end of the inspection. The competition agency typically provides the party which has been inspected with a full copy of the documents which have been copied. This is an opportunity to identify areas of dispute and formally note any area of disagreement. If there are documents which have been sealed then they will be checked at this stage. It is useful for the general counsel to identify any issues or mistakes which have arisen before the inspectors leave. It is also important to use the opportunity to confirm the status of the inspection and the investigation.

Remain agile and flexible throughout

As mentioned above, no two inspections are identical. Therefore, it is important that the general counsel and the response team are agile and flexible throughout, so as to meet the needs of the inspection.

After the inspection

Immediate debrief

It is tempting for the general counsel, the executives and the external lawyers to go home and leave the premises of the undertaking (or association of undertakings) immediately after the inspectors leave. The team will be tired. In fact, it would be prudent for all of the team to remain on the premises and hold an immediate and detailed debrief after the inspectors leave. The external lawyers should take a detailed note of what could be learned from the inspection. Very thorough notes should be taken of the debrief because it will record the immediate reactions and information of those affected by the inspection.

Preserve copies

Copies of all documents which have been inspected, copied or retained by the inspectors should be separated and kept separate. It is important that the general counsel knows exactly what documentation has been reviewed by the inspectors. It is also important that the IT personnel are asked to retain copies of all documents which have been imaged or reviewed and that a backup is kept of the documents before and immediately after the inspection.

Don't worry about other undertakings

It could be tempting to see if others are also being inspected. Do not contact others. Moreover, the general counsel should be concerned with the undertaking's own issues because the inspection is just the beginning of a process which might last several years.

This article was first published in in Competition Law Insight. Authored by Dr Vincent Power, Partner and Head of EU, Competition & Procurement at A&L Goodbody, vpower@algoodbody.com. This is general guidance only and specific privileged legal advice should be obtained before making any decision about the issues addressed in this briefing.