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Competition dawn
raid response pack



March 2011

Competition Dawn Raids

What you need to know about dawn raids

Dawn raids – unannounced visits from competition authorities – get their name from the inspectors' habit of turning up at the beginning of the business day, when companies are likely to be least prepared for the unexpected.

The European Commission has for many years had the power to carry out such raids as part of its investigations into alleged breaches of EU competition law. EU inspectors may be accompanied by inspectors from the UK Office of Fair Trading (OFT).

The OFT has extensive powers to investigate potential breaches of UK competition law and also to investigate on its own behalf breaches of EU competition law. These powers are similar (but not identical) to those of the European Commission and include the power to conduct dawn raids. The OFT can enter and search premises, using force if necessary, to obtain evidence of unlawful agreements or conduct. In addition, the European Commission or another national competition authority may request the OFT to carry out a dawn raid on its behalf.

Quite separately, the OFT may investigate potential cases of a criminal cartel offence which is specific to the UK. There is no criminal competition law offence at the EU level.

What type of dawn raid is it?

It is important to ascertain:

- whether an inspection is being carried out by EU or OFT inspectors and, if by OFT inspectors, whether they are doing so on their own behalf or on behalf of the European Commission or another national authority; and

- what type of authorisation the officials possess

as the powers of the inspectors and possible penalties will vary accordingly.

In many cases, businesses receive no warning of an inspection by the competition authorities. The authorities may also make announced inspections where the business will be given notice of the time of their visit. The powers and offences applicable to unannounced visits also apply to inspections which are announced. The description of those powers and offences in this pack applies to all visits.

On arrival, the inspectors should produce a document setting out the type of inspection they are to carry out, the legal basis, the subject matter of the investigation, the purpose, and the nature of the offence and penalties applicable in the event of non-compliance.

European Commission inspectors (or OFT inspectors acting on their behalf) will be armed with either an "authorisation" or a "decision" with or without the additional powers of a judicial warrant. Inspections by the OFT acting on its own behalf or on behalf of another national authority will be made under written OFT authorisation with or without a judicial warrant.

The inspectors' powers of investigation are set out in more detail in the following three inserts into this pack:

- investigations by the European Commission;
- investigations by the OFT – Article 101, Article 102, Chapter I prohibition, Chapter II prohibition; and
- investigations by the OFT into the criminal cartel offence.

The main powers available to inspectors under the various types of dawn raid are summarised in a comparative table included as a separate insert into this pack.

What are the offences and penalties involved in not complying?

The obstruction of and failure to comply with properly authorised inspectors always carry the risk

of fines. They may also result in criminal offences carrying the risk of fines or imprisonment (or both). It is important to remember that these criminal offences concern a failure to co-operate in an investigation and not the alleged breach which is the subject of investigation. It is only in the case of the UK cartel offence that the breach itself of competition law is a crime.

Failure to co-operate with EU officials who carry an authorisation or a decision but no court warrant may result in fines. For raids where OFT inspectors with a court warrant accompany or act on behalf of EU inspectors, it may be a criminal offence to obstruct the inspectors or to fail to comply with any requirement which the inspectors are authorised to impose in the course of the investigation.

For raids where the OFT acts with or without a warrant on its own behalf or on behalf of another national authority, it is a criminal offence to fail to comply with any requirement. A number of specific offences may lead to prison sentences of up to two years, rising to five years in the context of an investigation into an alleged cartel offence.

Each of the three inserts into this pack detailing the inspectors' powers finishes by summarising in a table the offences and penalties involved in not complying with the relevant type of investigation.

[What should I do if my business is the subject of a dawn raid?](#)

Being prepared is key. Ideally your firm will already have in place a dawn raid response plan to deal with the surprise circumstances of a dawn raid, so that if you are the subject of an investigation, the responsibilities of the members of your firm – from the receptionist to senior management – will already be clearly set out.

There are detailed provisions in UK and EU law, and in procedural rules and guidelines, setting out what the competition regulators and inspectors may do in the course of an investigation. Criminal sanctions can apply if the investigators are obstructed or if their requirements are not complied with. Having a dawn raid response plan in place ensures that relevant people within the organisation know what to do, thus minimising the risk of an unwitting breach of the rules.

If your business is the subject of a dawn raid by the competition authorities, immediate help is available by calling our **Dawn Raid Hotline** number **020 7367 3499** and by referring to the rest of this pack.

Competition Dawn Raids

Investigations by the European Commission

Competition dawn raids in the UK are carried out by the European Commission and/or the Office of Fair Trading (OFT) enforcing the Treaty on the Functioning of the European Union (TFEU) and/or the UK's Competition Act 1998 (CA98). These two authorities have different powers and can impose different penalties. In the UK, there is a criminal offence for cartel behaviour.

Under Council Regulation (EC) 1/2003 (the Regulation), the OFT also has powers to carry out EU law investigations on its own behalf and to act on behalf of the European Commission or other competition authorities.

Companies need to be aware of the exact type of competition raid they are facing, which should be clear from the authorisation documentation carried by the inspectors. This is because the inspectors' powers and the possible penalties differ depending on the type of raid. The various types of competition investigations involving dawn raids which can happen in the UK can be divided into three main types, which are:

- EU investigations into restrictive agreements and/or abuse of dominance (Articles 101 and 102 TFEU);
- OFT investigations into restrictive agreements and/or abuse of dominance (Article 101/Chapter I CA98 and Article 102/Chapter II CA98); and
- OFT investigations into the UK criminal cartel offence (Enterprise Act 2002).

We deal with each of these three types of investigation in a separate insert into this Dawn Raid Response Pack. This insert deals with investigations by the European Commission.

Investigations by the European Commission (Article 101, Article 102)

The European Commission continues to investigate infringements of Articles 101 and 102 throughout the EU. It has stated that it intends to focus its resources on the most harmful cases of infringement, while allowing national authorities such as the OFT to apply Articles 101 and 102 in their territories. However, it should not

be assumed that the European Commission does not carry out investigations through dawn raids in Member States. Under the Regulation it has extensive powers to enforce Article 101 and Article 102, including the power to seal premises and to go into private homes.

Grounds for an investigation

The European Commission is required to have reason to suspect an infringement before it may use its investigative powers. In other words, it is not allowed to go on a "fishing expedition", looking for infringements and evidence at the same time. The European Commission may become aware of a restrictive agreement or practice as a result of its own investigation, through an investigation commenced by a national authority or due to a complaint by an aggrieved third party.

What powers does the European Commission have?

The European Commission has two main investigatory powers:

- the power to request information¹; and
- the power to carry out on-the-spot investigations including the power to search directors' homes in the EU².

In addition, the European Commission may request an EU national authority to carry out an on-the-spot investigation on its behalf. The European Commission can request any information that is "necessary" for the enforcement of the competition rules and has a wide discretion in deciding when information is needed.

Requests for information

The European Commission's power to send written requests for information gives it two options:

- send a written simple request for information³, stating the legal basis and purpose of the request, specifying the information required, the time limit

¹ Article 18 of the Regulation

² Articles 20 and 21 of the Regulation

³ Article 18 letter

for replying, and the penalties for supplying incorrect or misleading information. The firm may choose whether to respond, though the threat of a formal decision (see below) in practice provides the incentive to reply. Care must be taken to ensure the information supplied is correct and not misleading (whether supplied intentionally or negligently), otherwise the European Commission may impose fines of up to 1% of total turnover in the preceding business year;

- ▶ issue a formal binding decision to compel production of information, stating the legal basis and purpose of the request, specifying the information required, the time limit for supplying it and the penalties for failing to supply it or for supplying incorrect or misleading information. Failure to comply can result in fines of up to 1% of total turnover in the preceding business year for supplying incorrect or misleading information and up to 5% of daily turnover for failure to supply complete and correct information for each day until the breach is remedied.

Both Article 18 requests and Article 18 formal decisions may be sent not only to the firm alleged to have committed an infringement, but also to its suppliers, customers or competitors.

The European Commission also has the power to take statements from any person who consents for the purposes of gathering information relating to the investigation⁴.

Investigation of business premises – dawn raids

The European Commission has the right to carry out on-the-spot “voluntary” inspections of business premises by way of European Commission authorisation – to which a firm is not obliged to submit – or “mandatory” inspections by way of European Commission decision – to which a firm is required to submit. The European Commission might opt for mandatory inspection for a variety of reasons: the firm has already refused to submit to a “voluntary” inspection; the European Commission suspects the existence of particularly serious infringements and is concerned that documents or other evidence might disappear; the investigation involves a number of firms located in more than one EU Member State and the effectiveness of the European Commission’s investigation would be hampered by the inability to conduct simultaneous inspections.

The procedure for a voluntary inspection of business premises requires a European Commission authorisation specifying the subject matter and purpose of the inspection, the penalties for producing incomplete documentation and the penalties for providing incorrect or misleading answers to questions asked by the inspectors when carrying out the investigation. A decision for a mandatory inspection must additionally specify a date for the investigation to be carried out, the penalties for failure to submit to the inspection and the firm’s right to have the decision reviewed by the General Court.

Where a firm submits to a voluntary investigation, it must actively assist the European Commission inspectors, who will then have the same powers as if the inspection were “mandatory”. The European Commission inspectors are usually accompanied by OFT inspectors for raids in the UK. They may also have a judicial warrant allowing them to gain entry to premises and/or to conduct an active search.

Investigation of other premises

The European Commission has the power to inspect any other premises, land and vehicles, including the homes of directors, managers and other staff where it reasonably suspects that relevant books or records are kept there. The European Commission may only exercise this power by way of a formal decision and must first consult the national authority of the EU Member State in which the inspection will be carried out and obtain prior authorisation from the courts of the EU Member State concerned. The decision must state the subject matter and purpose of the inspection, a date for it to be carried out, the reasons which have led the European Commission to suspect that relevant information is kept there and the right to have the decision reviewed by the General Court.

The European Commission may not “seal” homes or ask for explanations of documents or facts relating to the inspection when inspecting domestic premises.

Your rights when inspectors arrive

Inspections will generally be carried out during office hours. When inspectors arrive at the premises, you should ask to see:

- ▶ their identification (European Commission / OFT staff ID cards for OFT inspectors assisting the European Commission or acting on its behalf), of which a note should be made;

⁴ Article 19 of the Regulation

- a document setting out the scope of their investigatory powers and the subject of the investigation; and
- where there is a warrant for the inspection, a copy of the warrant specifying the named officer in charge of the investigation.

Firms and individuals are entitled to contact their legal adviser, who may also attend the inspection. Inspectors will normally agree to wait a short time for the lawyer to arrive, provided they consider it reasonable to do so and this would not impede the investigation. European Commission inspectors are unlikely to wait over 30 minutes. While they wait, they may take such measures as they feel necessary to ensure that other parties are not warned of the investigation, or that evidence is not removed or tampered with. This could include the suspension of external e-mail, waiting in selected offices or rooms and in the case of an investigation of business premises, sealing premises and documents. No delay will be permitted where advance warning was given of the investigation or where there is an in-house legal adviser on the premises.

What happens in an inspection?

Inspectors normally arrive in a small group. European Commission inspectors are generally accompanied by a representative from the OFT.

On arrival at the premises, the inspectors will produce their authorisation, and will also show their European Commission/OFT staff cards in order to prove their identity.

During an inspection, total co-operation with the inspectors is required. Inspectors can:

- enter any premises, land and means of transport of the firm involved and also the homes of directors, management or other staff of the firms involved (homes by judicial warrant only);
- examine any book or business record (regardless of form);
- take copies or extracts of documents;
- in the case of investigations of business premises, seal premises, books or records; and
- in the case of investigations of business premises, ask for oral on-the-spot explanations of the documents and of facts referred to in the documents.

Where European Commission inspectors do not also have a UK judicial warrant, they may only ask for the production of documents and information. The law

does not give them the right to carry out the search themselves. Unless the firm agrees otherwise, the employees of the firm must perform the search. However, in practice, a firm may allow the inspectors to look through documents themselves rather than allocate resources to the task of producing documents. Where the European Commission inspects and there is also a UK judicial warrant (as OFT inspectors are accompanying the European Commission's inspectors), the UK warrant permits the inspectors to make an active search for documents. In the case of inspections of homes, a UK judicial warrant is required before the inspection can proceed. The warrant permits inspectors to make an active search for documents.

Safeguards and documents outside the scope of inspection

The inspectors may examine any document to determine whether it is relevant to their investigation, except for correspondence which is privileged because it is between the firm and its independent (not in-house) legal advisors established within the EU. Documents and letters emanating from both the lawyer and the client are covered. By contrast to the position under UK law, EU legal professional privilege does not extend to correspondence with the firm's in-house lawyer, unless that lawyer is simply reporting the statements of an independent lawyer. Where firms claim that documents are privileged, they must provide evidence that the documents qualify for such treatment.

Confidential information

Disclosure of information to the European Commission cannot be refused on the grounds that it would involve business secrets. There is however, protection from disclosure to competitors or third parties⁵.

Firms can protect their interests by drawing the attention of inspectors to particular documents relating to the inspection which are favourable to the firm and which the inspectors have not examined.

Self-incrimination

EU law recognises the right of privilege against self-incrimination. Thus, no member of staff (or individual in the case of a home inspection) is required to answer questions put to them by the European Commission where the answer might lead to an admission of an

⁵ Articles 27 and 28 of the Regulation

infringement of the competition rules. It is the European Commission's duty to prove such infringement.

Assistance in inspections by national authorities: warrants to enter and search

Where a firm refuses to submit to an investigation of its UK premises under a European Commission decision, the OFT may apply to the courts for a warrant conferring a right of entry on its inspectors and those of the European Commission. The right of entry allows the inspectors to use reasonable force to secure entry, and to search for books and records on the premises.

Penalties for non-compliance

European Commission authorisation only: A firm may refuse to submit to a voluntary inspection under an authorisation without fear of penalties being imposed in respect of this refusal.

European Commission decision: Firms and individuals must submit to mandatory inspections under a

decision and will face fines of up to 5% of daily turnover for failure to do so.

UK warrant in addition to European Commission documentation: Individuals who intentionally obstruct the exercise of these powers permitted by the warrant may find themselves the subject of criminal sanctions.

Fines

The European Commission may also impose fixed fines up to 1% of total turnover in the preceding business year for supplying incorrect or misleading information (simple request and formal decision) or daily fines of up to 5% of daily turnover for failure to supply complete and correct information (formal decision only). For ease of reference, penalties for failure to comply with a European Commission inspection are summarised in the box below

What should business do?

The European Commission has extensive powers of investigation under EU competition rules. Companies should seek legal advice so that they know their rights in the event that they are the subject of an investigation. In particular, firms should ensure that they have procedures in place to deal with a dawn raid should inspectors turn up unannounced, and brief all relevant personnel accordingly.

Failure to co-operate with European Commission competition investigations – offences and penalties

A company can be fined up to 1% of the company's total turnover in the preceding year for intentionally or negligently⁶

- failing to submit to an investigation ordered by European Commission decision
- failing to produce complete records or books
- giving incorrect or misleading answers to questions asked during an investigation (except domestic premises)
- failing to correct incomplete, incorrect or misleading verbal answers within a given time limit
- failing to provide answers to questions in an investigation ordered by a European Commission decision (except in domestic premises)
- breaking seals applied by EU inspectors

Periodic fines of 5% of the company's average daily turnover in the preceding business year can also be imposed for each day the company refuses to submit to an investigation authorised by a European Commission decision⁷.

In addition, where OFT inspectors with a warrant accompany or act on behalf of EU inspectors, it is a criminal offence intentionally to obstruct any person in the exercise of his powers. A person guilty of such an offence is liable (following a summary conviction) to a fine not exceeding the statutory maximum. A conviction on indictment, on the other hand, may lead to a prison term of up to two years and/or an unlimited fine.

⁶ Article 23(1) of the Regulation

⁷ Article 24(1) of the Regulation

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Competition Dawn Raids

Investigations by the Office of Fair Trading – Article 101, Article 102, Chapter I prohibition, Chapter II prohibition

Competition dawn raids in the UK are carried out by the European Commission and/or the Office of Fair Trading (OFT) enforcing the Treaty on the Functioning of the European Union (TFEU) and/or the UK's Competition Act 1998 (CA98). The two authorities have different powers and can impose different penalties. In the UK, there is a criminal offence for cartel behaviour.

Under Council Regulation (EC) 1/2003 (the Regulation), the OFT also has powers to carry out EU law investigations on its own behalf and to act on behalf of the European Commission or other competition authorities.

Companies need to be aware of the exact type of competition raid they are facing, which should be clear from the authorisation documentation carried by the inspectors. This is because the inspectors' powers and the possible penalties differ depending on the type of raid. The various types of competition investigations involving dawn raids which can happen in the UK can be divided into three main types, which are:

- EU investigations into restrictive agreements and/or abuse of dominance (Articles 101 and 102 TFEU);
- OFT investigations into restrictive agreements and/or abuse of dominance (Article 101/Chapter I CA98 and Article 102/Chapter II CA98); and
- OFT investigations into the UK criminal cartel offence (Enterprise Act 2002).

We deal with each of these three types of investigation in a separate insert into this Dawn Raid Response Pack. This insert deals with investigations by the OFT into restrictive agreements and/or abuse of dominance.

Investigations by the OFT

The CA98 is enforced by the OFT and the sector regulators. In this insert, the term "OFT" means the OFT and/or sector regulators, as appropriate. Under the Regulation, the OFT is also able to carry out on its own behalf investigations into possible infringements of Article 101 TFEU (restrictive agreements) and Article 102 TFEU

(abuse of dominance). It may also carry out investigations under Articles 101 and 102 on behalf of the European Commission or on behalf of another national authority. This is in addition to the OFT's powers under the CA98 to conduct investigations into possible infringements of the Chapter I prohibition (restrictive agreements) and Chapter II prohibition (abuse of dominance).

Powers of investigation

The OFT's powers are wide and include the ability to enter and search premises and use force in certain circumstances. It is important to be aware that the OFT has different powers depending on whether it:

- investigates on its own behalf (Article 101 or 102 and/or Chapter I or II); or
- investigates not on its own behalf (Article 101 or 102).

Powers also differ depending on whether business premises or domestic premises are inspected. More details on each of these areas are found in this insert.

OFT investigates on its own behalf (Article 101 or 102 and/or Chapter I or II)

The OFT's powers of investigation when investigating under Article 101 or Article 102 on its own behalf are the same as the powers of investigation it has when investigating under the Chapter I or Chapter II prohibition.

Grounds for an investigation

The OFT can only conduct an investigation where there are "reasonable grounds for suspecting" that the Article 101, Article 102, Chapter I or Chapter II prohibition has been infringed. Some examples of these grounds are given in the OFT's guideline "Powers of Investigation". Grounds for an investigation include a disgruntled cartel member having given the OFT information about a secret agreement to share markets or fix prices, or a

complaint having been made of some anti-competitive practice.

By launching an investigation and using its powers under the CA98 the OFT can determine whether there has indeed been an infringement of the rules.

What powers does the OFT have?

The CA98 gives the OFT two main powers when it acts on its own behalf:

- to request information - the power to require the production of specified documents or specified information; and
- to inspect premises - the power to enter premises without a judicial warrant, or to enter and search business premises with or without a judicial warrant and domestic premises with a judicial warrant.

Requests for information

The OFT can make informal enquiries at any time to obtain information. While no sanctions attach to informal requests, companies should take them seriously. Simply ignoring an informal letter may create the wrong impression. Failure to respond could trigger further formal action. Once an investigation has been launched, the OFT has power formally to request specific documents and information, and failure to comply will be a criminal offence.

To make a formal request for information, the OFT must serve a written notice setting out the subject and purpose of the investigation, the documents or information required and the possible offences for failing to comply. The notice may also specify the form in which the information is to be produced and will specify a deadline for compliance, according to the quantity and complexity of the information requested, the resources available to the recipient of the request and the urgency of the case. Individuals, companies or trade associations may all be served with notices, whether they are suspected themselves of an infringement or have information which could assist the OFT's investigation.

The information which can be requested includes estimates, documents and computer records. The OFT can also require the compilation of information which is not already recorded at the time of the request, for example a chart showing market shares. It can take copies of information produced and can ask for explanations of material it contains both from the person providing it and from employees. If the required document cannot be produced, the OFT may ask where it can be found. The OFT may obtain information from third parties as well as the entity under investigation, and

once information has been provided it may make further requests for documents or explanations.

Investigations of business premises

Business premises include not only the centre of business operations, but also vehicles. An investigation may be by simple authorisation of the OFT or with the additional powers of a judicial warrant.

In most cases where there is no warrant for the inspection (i.e. there is only an OFT authorisation), inspectors may not enter premises, unless the occupier has been given written notice.

In many cases, OFT inspectors will in fact have a warrant. Where there is a warrant for the inspection, no advance notice will be given and the inspectors can use reasonable force to enter the premises, if necessary. They can, for example, use equipment to force locks. They may make an active search for documents, seize documents, require explanations of documents and require electronic information to be put into a format whereby it can be taken away by inspectors. However, where the premises are unoccupied, inspectors have a duty to take reasonable steps to inform the occupier of the intended entry and allow him a reasonable opportunity to be present before executing the warrant. Where this has not been possible, they must leave a copy of the warrant in a prominent place and leave the premises as effectively secured as when they entered them.

Investigations of domestic premises

The OFT may also enter domestic premises to carry out investigations. Domestic premises are premises used as a dwelling and also used in connection with the affairs of a business or where documents relating to the business are kept. This power is only available to the OFT where it has first obtained a judicial warrant.

A warrant for an investigation of domestic premises will be granted where there is a reasonable suspicion that there are on the premises relevant documents which have not been produced on request, or which would be tampered with or concealed if they were requested.

OFT inspects under Article 101 or 102 not on its own behalf

Where the OFT inspects under Article 101 or 102 on behalf of the European Commission and where it assists European Commission inspectors in their Article 101 or 102 investigations, the OFT has the same powers as European Commission inspectors (see the insert to this pack entitled "Investigations by the European

Commission” for more details on powers of European Commission inspectors). This gives the OFT an extra power in these cases to ask for facts regarding the subject matter or purpose of the investigation. This power to ask for facts is not available where the OFT investigates under Article 101 or 102 on its own initiative or where it investigates under the Chapter I or Chapter II prohibition.

OFT inspectors assisting or performing an EU inspection will often carry a UK judicial warrant, granting powers similar to those enjoyed by OFT inspectors conducting their own inspections under warrant. The chief difference is that OFT inspectors performing EU inspections cannot seize and remove documents or specially formatted electronic information.

On the other hand, the OFT’s powers in relation to an inspection on behalf of another national authority resemble its powers during investigations on its own behalf.

Your rights when inspectors arrive

Inspections will generally be carried out during office hours. When inspectors arrive at the premises, businesses should ask to see:

- their identification;
- a document setting out the scope of their investigatory powers and the subject of the investigation;
- where there is a warrant for the inspection, a copy of the warrant specifying the named officer in charge of the investigation; and
- the OFT will also provide a separate document setting out the powers of authorised officers and the right of the occupier to request that a legal adviser is present.

Inspectors should agree to wait a short time for the lawyer to arrive, provided they consider it reasonable to do so and this would not impede the investigation. The OFT follows the European Commission’s practice (so the delay would probably not exceed 30 minutes). In the meantime, the inspectors may take such measures as they feel necessary to ensure that other parties are not warned of the investigation, or that evidence is not removed or tampered with. This could include the suspension of external e-mail, sealing filing cabinets, waiting in selected offices and the sealing of premises and documentation. No delay will be permitted where advance warning was given of the investigation or where there is an in-house legal adviser on the premises.

What happens in an inspection?

Inspectors can bring with them any equipment they consider necessary for the inspection. This may include tape recorders and laptops. During the inspection, they can require any person on the premises to produce any document which they consider to be relevant to the investigation. They can also ask for explanations of the material. Where a document cannot be produced, the officers can demand to be told where it is. In addition, investigating officers can take copies or extracts from documents, and where information is held on computer, they can require it to be provided in a readable form in which it can be taken away. This applies not only to computers on the premises themselves, but also to information held on any computer accessible from the premises. In addition, investigating officers may take any measures they believe are necessary to preserve documents e.g. sealing offices for up to 72 hours.

Where there is a warrant for the inspection, investigating officers can actually search the premises and take possession of any relevant document where they consider this necessary to protect the material or prevent tampering or where they are not able immediately to decide whether a document is relevant to the investigation (unless the inspection is in fact part of an EU investigation).

Documents outside the scope of inspection

There is some protection for business against these powers. Whether the OFT is investigating possible infringements of the Chapter I or Chapter II prohibitions or possible infringements of Article 101 or 102, no matter whether on its own initiative or on behalf of the European Commission or another national authority, it cannot require the production of documents which would be protected from disclosure in the UK courts on the grounds of legal professional privilege. This applies to communications between a professional legal adviser and his client, and to documents made in connection with or in contemplation of legal proceedings, for the purpose of those proceedings.

It is important therefore for companies to identify which documents can be protected from inspection. The scope of legal professional privilege is wider for these purposes than the equivalent protection under investigations carried out by the European Commission on its own behalf. It will cover not only advice from external lawyers in private practice, but also communications with in-house legal advisers.

There is also a defence against self-incrimination. The OFT cannot therefore compel anyone to provide answers which could contain the admission of an infringement. It is the OFT’s duty to prove such infringement.

As far as confidential information is concerned, while this must be produced to the OFT, there are limits on the extent to which the OFT can publish or disclose the material. It is up to the OFT to determine whether information is in fact confidential in any given case, but, generally speaking, confidential information cannot be disclosed without the consent of the individual or business to which it relates. There are various exceptions to this, including where disclosure of the information is necessary to enable the OFT to fulfil one of its functions under the CA98 or the Enterprise Act 2002.

Co-operation with inspections

The CA98 provides that a warrant to enter and search premises may be obtained where a European Commission or OFT investigation has been or is likely to be obstructed. Criminal sanctions are available against individuals who intentionally obstruct the OFT in the exercise of its powers to investigate under Article 101 or 102 (whether on its own initiative, or on behalf of the European Commission or another national authority) or the Chapter I or Chapter II prohibition.

Refusal to co-operate with the terms of a UK warrant or authorisation is a criminal offence. Sanctions may be imposed on individuals, as well as on corporate undertakings, who intentionally obstruct an investigation. Generally, the applicable penalty will be a fine. But some offences carry the possibility of imprisonment. These include intentionally obstructing an officer carrying out an inspection under a warrant, or intentionally or

recklessly supplying false or misleading information or concealing relevant documents. For ease of reference, penalties for failure to comply with an OFT inspection under the CA98 are summarised in the box at the end of this insert.

What type of inspection is it?

It is important to ascertain what sort of authorisation the inspectors have, because their powers vary accordingly. Without a warrant, investigating officers can enter premises, call for the production of documents, require explanations from individuals, require electronic information to be put into a form where it can be taken away and seal premises for up to 72 hours subject to limited exceptions. Only a warrant conveys the power actively to search premises, or if necessary to force entry and to seize documents and decide later whether they are relevant.

What should business do?

The powers of investigation contained in the CA98 for Article 101, 102, the Chapter I prohibition and the Chapter II prohibition are wide-reaching, and enable the OFT to take an active lead in their enforcement. Companies should ensure they have procedures in place to deal with a dawn raid, should investigating officers turn up unannounced, and brief all relevant personnel accordingly

Failure to co-operate with Office of Fair Trading Competition Act 1998 investigations – offences and penalties

Under the Competition Act 1998 (CA98), a person may be guilty of a criminal offence if he commits any of the following actions:

- fail to comply with a requirement imposed under the OFT's investigative powers in the absence of a reasonable excuse (section 42 CA98)
- intentionally obstruct an inspector carrying out an on site inspection, either with or without a warrant (also section 42 CA98)
- intentionally or recklessly destroy, dispose of, falsify or conceal a document the production of which has been required, or cause or permit the same (section 43 CA98)
- knowingly or recklessly provide information which is false or misleading in a material way (section 44 CA98)

A person found guilty of a section 42 failure to comply or of obstructing an officer who does not have a warrant is liable to a fine. The fine is subject to a statutory maximum for a summary conviction, but unlimited for a conviction on indictment.

A person found guilty of obstructing an officer who does have a warrant or of any section 43 or 44 offence is liable (following a summary conviction) to a fine not exceeding the statutory maximum. A conviction on indictment, on the other hand, may lead to a prison term of up to two years and/or an unlimited fine.

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Competition Dawn Raids

Investigations by the Office of Fair Trading – cartel offence

Competition dawn raids in the UK are carried out by the European Commission and/or the Office of Fair Trading (OFT) enforcing the Treaty on the Functioning of the European Union (TFEU) and/or the UK's Competition Act 1998 (CA98). These two authorities have different powers and can impose different penalties. In the UK, there is also a criminal offence for cartel behaviour.

Under Council Regulation (EC) 1/2003, the OFT also has powers to carry out EU law investigations on its own behalf and to act on behalf of the European Commission or other competition authorities.

Companies need to be aware of the exact type of competition raid they are facing, which should be clear from the authorisation documentation carried by the inspectors. This is because the inspectors' powers and the possible penalties differ depending on the type of raid. The various types of competition investigations involving dawn raids which can happen in the UK can be divided into three main types, which are:

- EU investigations into restrictive agreements and/or abuse of dominance (Articles 101 and 102 TFEU);
- OFT investigations into restrictive agreements and/or abuse of dominance (Article 101/Chapter I CA98 and Article 102/Chapter II CA98); and
- OFT investigations into the UK criminal cartel offence (Enterprise Act 2002).

We deal with each of these three types of investigation in a separate insert into this Dawn Raid Response Pack. This insert deals with investigations by the OFT into the cartel offence.

Investigations by the OFT regarding the cartel offence

In June 2003 the Enterprise Act (EA), introduced a criminal offence for individuals dishonestly to agree to fix prices, limit/prevent supply or production or be

involved in bid-rigging. This offence is known as the cartel offence. The cartel offence is enforced by the OFT, which has wide powers to investigate by notice in writing or by entering and searching premises, using force where necessary, under the authority of a warrant. Also, the Serious Fraud Office (SFO) may become involved in certain aspects of cartel offence cases.

Since introduction of the cartel offence, there has been only one prosecution under this offence, although it is understood that other cartel offence investigations are in progress. In June 2008, sentences were handed down to three executives involved in a cartel for marine hoses, used to transport oil between tankers and storage facilities. The executives pleaded guilty and were initially sentenced to jail terms of between two and a half to three years and were also disqualified from acting as company directors for between five and seven years. In November 2008, the Court of Appeal reduced the men's prison sentences to between 20 and 30 months, while specifically noting that the sentences in this case should not be regarded as giving guidance for other cartel offence cases. One of the reasons for this disclaimer is the fact that the executives had also entered into a plea agreement with the US authorities which set out minimum sentences they would seek in the UK courts. The Court of Appeal did however note that the following would be considered as general guidance on cartel offence sentencing:

- the gravity and nature of the offence;
- the duration of the offence;
- the degree of culpability of the defendant in implementing the cartel agreement;
- the degree of culpability of the defendant in enforcing the cartel agreement;
- whether the defendant's conduct was contrary to guidelines laid down in a company compliance manual; and

- mitigating factors e.g. any co-operation the defendant may have provided in respect of the enquiry, whether or not the defendant was compelled to participate in the cartel under duress, whether the offence was a first offence and any personal circumstances of the defendant which the courts may regard as a factor suggesting leniency.

In another case, the Court of Appeal clarified in May 2010 that for cartel offence purposes the prosecution has to prove the dishonesty only of the defendants and not of other participants in the relevant cartel. This issue arose in preparatory hearings before the trial of four British Airways executives charged with the cartel offence for price-fixing. The trial itself collapsed (also in May 2010) when the OFT was unable to produce sufficient evidence and had to withdraw its case.

Grounds for an investigation

The OFT can conduct an investigation where there are "reasonable grounds for suspecting" that the cartel offence has been committed and it may exercise its powers of investigation where it has "good reason to exercise them for the purposes of investigating the affairs...of any person".

What powers does the OFT have?

The EA gives the OFT three main powers:

- to require the production of relevant information – the power to require the production of specified documents/information or answers to questions;
- to inspect premises – the power to enter premises and search and seize documentation provided there is a judicial warrant; and
- to carry out intrusive surveillance – the power, with authorisation, to conduct surveillance of an individual suspected of participating in a cartel for the purposes of preventing or detecting a cartel offence.

The OFT may carry out these powers using its own officers or delegate certain of them to other "competent persons".

Require production of information

The OFT has the power to require, by notice in writing, production of relevant documentation or information (in any form) at a specified place, either at a specified time or on the spot. These written requests must indicate the subject matter of the investigation and the further criminal offences which may be committed for failing to comply (see the box below).

The OFT may take copies of any documents produced or require explanations of them from any person producing them. In the event that documents are not produced, the OFT may require the person required to produce them to state to the best of his knowledge where they are.

Investigation of premises – dawn raids

The OFT may, with a judicial warrant, enter premises using such force as it considers necessary where it is satisfied that there are reasonable grounds for believing that there are documents relevant to the OFT's investigation on the premises and:

- a person has failed to comply with the requirement to produce documents;
- it is not practicable to require the production of information; or
- to do so might seriously prejudice the investigation.

Having entered the premises, the OFT may search them and seize relevant documents or take necessary steps to preserve them. The OFT may also require a person to provide an explanation of a relevant document or to explain to the best of his knowledge its whereabouts. The OFT may require electronically stored information to be produced in a form which can be taken away and which is visible and legible or from which it can readily be produced in a visible and legible form (namely a print-out or a disk).

A person may be guilty of additional criminal offences for failing to comply (see the box below).

Your rights when inspectors arrive

You should ask to see:

- the inspectors' identification;
- a document setting out the scope of their investigatory powers and the subject of the investigation; and
- a copy of the warrant specifying the named officer in charge of the investigation, without which you are not required to comply with any of the above requirements.

Penalties for non-compliance

Failure to comply with the OFT's powers of investigation under the cartel offence may result in a number of potential offences which are punishable by a term of imprisonment, a fine or both. For ease of reference, penalties for failure to comply with an OFT inspection are summarised in the box at the end of this insert.

Documents outside the scope of inspection

There is some protection for individuals against the OFT's investigatory powers. The OFT cannot require the production of documents which would be protected from disclosure in the courts on the grounds of legal professional privilege. This privilege works in the same way as described in the main insert into this pack regarding the OFT's civil investigations.

In addition, of relevance to banks is that a person may not be required to disclose any information/documentation in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless the person to whom he owes the obligation of confidence consents or the OFT has authorised the requirement for him to produce it.

Self-incrimination

There would appear to be only a limited defence against self-incrimination under the cartel offence since:

- a statement provided by any person during investigation of a cartel offence may be used in evidence against him on a prosecution of the offence of making false or misleading statements;
- it may also be used in connection with another offence where in giving evidence another statement is made which is inconsistent with that made in connection with the cartel offence; and
- a statement made by anyone during a CA98 investigation may be used in evidence against him on a prosecution of the cartel offence if when giving evidence in relation to the latter he makes a statement inconsistent with one made in connection with the CA98 investigation and evidence relating to that statement is adduced, or a question relating to it is asked, by him or on his behalf.

Confidential information

Although confidential information must be produced to the OFT during investigation of the cartel offence, the OFT may not disclose (except with consent) information whose disclosure it considers is contrary to the public interest or which relates to the private affairs of individuals and disclosure of which would significantly harm the individual's interests. Any disclosure the OFT deems necessary must also take into account the purpose for which the OFT is permitted to make the disclosure.

The OFT may disclose confidential information to the European Commission if this is required to fulfil an EU obligation and to any overseas public authority (including the European Commission but also other national regulators) to facilitate any investigation or civil proceedings or any criminal investigation.

Failure to co-operate with investigations into the cartel offence – offences and penalties¹

In relation to an EA criminal investigation, individuals may be guilty of a criminal offence if they commit any of the actions in the following list. Similar offences are provided for in relation to criminal investigations by the SFO into potential cartels (section 2, Criminal Justice Act 1987).

- Fail to comply with a requirement imposed on them during the OFT investigation without a reasonable excuse

Summary conviction: capped fine and/or up to 6 months prison

No conviction on indictment

- Knowingly or recklessly make a false or misleading statement

Summary conviction: capped fine and/or up to 6 months prison

Penalty following a conviction on indictment – up to 2 years' imprisonment and/or an unlimited fine

- Destroy, dispose of, falsify or conceal documents relating to the investigation (or allow the same to happen) knowing or suspecting that an investigation is being or is likely to be carried out by the OFT or the SFO

Summary conviction: capped fine and/or up to 6 months prison

Penalty following a conviction on indictment – up to 5 years' imprisonment and/or an unlimited fine

- Intentionally obstruct a person carrying out an investigation with a warrant

Summary conviction: capped fine

Penalty following a conviction on indictment – up to 2 years' imprisonment and/or an unlimited fine

Summary conviction for all offences leads to a capped fine and/or up to 6 months' imprisonment other than summary conviction for the offence of intentional obstruction which leads to a capped fine only.

¹ Section 201 EA

Dawn Raid emergency checklist

CMS Cameron McKenna

2011

Reception

- Greet inspectors
- Check their authorisations and take names: copy their authorisations and any warrant
- Seat officials in empty room, offer refreshments, explain that you will call a senior person
- Notify these people straight away:
 - anyone for whom the officials ask by name
 - MD:

Name:
Tel:
 - in-house lawyer:

Name:
Tel:
- If in-house lawyers not available, call external lawyers
- Contact details are on the back of this card

Senior management

- Appoint a person to act as point of contact with the inspecting authority
- If you do not have in-house lawyers available, call external lawyer (see contact details on the back of this card)
- Let inspectors know the ETA of your in-house or external lawyer and ask if they will wait
- Call head office/other group companies in case of parallel investigation (unless officials have specified to the contrary)
- Show inspectors to a suitable conference room in the area where they wish to begin their investigation
- Do not leave inspectors alone in conference room or unescorted in the Company's premises
- Get team together and allocate a person to each inspector

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- If inspectors wish to start investigation before lawyer arrives, check their documentation and scope of inquiry, if necessary over phone with lawyer; agree with lawyer where inspectors should start
 - Take copies of all documents and notes of all questions and answers pending lawyers' arrival
 - Do not let inspectors review legally privileged correspondence
 - Appoint a person to deal with any media inquiries

Golden Rules

- Be polite but firm
- Check identity + authorisation (warrant?) + scope of investigation
- Check lawyer informed (or, if lawyer, check you remain informed)
- Always accompany competition inspectors
- Keep record of everything inspectors do
- Do not let inspectors have documents which are privileged or outside scope of investigation
- Be helpful (non-compliance may be a crime) but don't answer incriminating questions
- Stay calm, be factual
- If you don't know the answer to a question, say so

Contacts

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