PREPARED ON BEHALF OF

PRAGER DREIFUSS
ATTORNEYS AT LAW



TalkingPoint

PREPARING FOR A DAWN RAID

REPRINTED FROM EXCLUSIVE ONLINE CONTENT PUBLISHED IN:
MARCH 2015

FINANCIER WORLDWIDE corporatefinanceintelligence

© 2015 Financier Worldwide Limited.
Permission to use this reprint has been granted by the publisher.

FW moderates a discussion on preparing for a dawn raid between Satnam Tumani, a partner at Kirkland & Ellis International LLP, Bernhard Lauterburg, counsel at Prager Dreifuss AG, and Agnes Quashie, a partner at PricewaterhouseCoopers Legal LLP.



Satnam Tumani
Partner

Kirkland & Ellis International LLP

Satnam Tumani is a partner at Kirkland & Ellis International LLP. His practice focuses on a range of white-collar and corporate crime matters, contentious regulatory cases, government and internal investigations, FCPA & UK Bribery Act compliance advice and related anti-money laundering issues. Mr Tumani is regularly asked to speak at conferences and seminars on white-collar crime matters. He has been appointed to the Law Society's Money Laundering Taskforce and is a member of the City of London Law Society's Corporate Crime & Corruption Committee. He can be contacted on +44 (0)20 7469 2390 or by email: satnam.tumani@kirkland.com.



Bernhard Lauterburg
Counsel

Prager Dreifuss AG

Bernhard Lauterburg is a member of Prager Dreifuss' competition law team. He concentrates on antitrust and merger proceedings of domestic and foreign clients and thereby regularly collaborates with international law firms. Apart from competition law, Mr Lauterburg focuses his practice on international trade regulations, including investment treaty law and arbitration, and WTO law. He can be contacted on +41 31 327 54 54 or by email: bernhard.lauterburg@prager-dreifuss.com.



Agnes Quashie
Partner

Pricewaterhouse Coopers Legal LLP

Agnes Quashie is a partner and Practice Group Leader of PwC Legal's Regulatory and Commercial Disputes team. With a career spanning 20 years, she has worked for a range of clients in high profile UK and international cases. Ms Quashie leads complex cases from first instance through to the Supreme Court and European Court of Justice (ECJ) and regularly advises and assists clients in respect of large and complex commercial disputes and also large scale investigations by regulatory and prosecuting authorities such as the Serious Fraud Office and HM Revenue & Customs. She can be contacted on +44 (0) 20 7212 1511 or by email: agnes.quashie@pwclegal.co.uk.

FW: How would you describe the risks and consequences that a company may face if it fails to respond effectively and appropriately to a dawn raid?

Tumani: Any failure to cooperate with an investigation can have significant consequences. Often, an authority, such as the European Commission, has the power to impose penalties wherever companies do not cooperate with, or obstruct, an investigation. Conversely, sometimes being prepared to provide assistance can result in a reduction to any fine. For example, if a company assists an authority and provides information regarding inappropriate behaviour, then there may be a reduction in ultimate fine to recognise this assistance. If the investigators are acting pursuant to a search warrant, there may be criminal liability involved in refusing to cooperate with the search. Furthermore, any failure in appropriately responding to a raid could harm the company's interests, as it may result in the inadvertent disclosure of privileged information, the provision of incorrect or misleading information, or negative publicity and reputational damage – especially if the company provides comments to the press prior to any media strategy being properly decided.

Lauterburg: Dawn raids not only affect a company's reputation, they can also impact a company's business operations when offices are sealed, documents reviewed, employees prevented from carrying out their work, and so on. Hence, a company faced with an unexpected search should have procedures in place to keep the impact of a search as low as possible. When faced with a search, companies should read the search warrant carefully to understand the object of the search and the scope of the investigation in order to lead investigators to the relevant documents and premises to avoid disruption of non-affected business operations. Be cooperative and explain where to find documents they might be interested in. Investigators are people whom the company will have to work with during the investigation, so it doesn't help to create a hostile environment. Of course, that should not mean that companies should forget about their legal and procedural rights. In rare instances, when the search warrant contains formals errors, the search could be avoided – at least for a short period of time which again gives a company some extra time to prepare for the search. However, a defective search warrant can, in most cases, be cured in a relatively short timeframe. Companies should not hesitate to retain specialist outside counsel immediately. External counsel can assist companies with crucial decisions such as – in competition matters – whether or not to file a leniency application and can help to safe guard a company's procedural rights. An appropriate reaction at the very beginning may save a lot of future pain.

Quashie: Failure to respond appropriately to a dawn raid could be potentially catastrophic for the business. A search of a business by law enforcement is a very anxious time for staff and can be very off putting for customers who might happen to be on the premises. A business search does not always take place at dawn; however, search officers will often appear unannounced, perhaps as the business is being opened up or shortly thereafter. Invariably, seeing a team of officers, some of whom may be in police uniform, can send staff into a panic and in today's world of instant information via social media, it can result in unhelpful messages being posted such as "we knew this would happen" or "it was only a matter of time" even when such messages may be unjustified. Also, the officers attending, depending on whether they are constables, HMRC or NCA officers, may also have the power to arrest any person obstructing them in the execution of their duty. It is important that all staff are fully cognisant of the very serious nature of the search and its consequences, not just for the business, but also for anyone who might attempt to interfere with the search.

FW: In the event of a dawn raid, what immediate actions

should a company take to protect its interests and avoid damaging its relationship with the authorities?

Lauterburg: When a dawn raid occurs, whether it is in a large or a small company, front desk staff are usually first confronted with the authorities. They should be prepared to take the correct action – treat the authorities as customers, lead them to a meeting room and inform the competent management person. Normally, authorities will not commence their search immediately, unless it is necessary as a precautionary measure. Management should then verify the authorities' credentials, which includes checking the search warrant and inquiring about the scope of the investigation. If none currently exists, and this is the case in most companies, an internal team should be established immediately to accompany the investigators while they are searching the premises. The company should be always be aware of what documents the investigators review and seize. Make copies of these documents and keep an accurate record of the search. Do not leave investigators unattended. Although the competition authorities will not commence their search immediately, they will not wait for a long time until external counsel is on site. If possible, companies should propose that the authorities begin their search at less critical premises in order to permit a search of more critical premises with external counsel being present. It should be borne in mind, however, that the authorities need not to satisfy such requests. Generally, companies subject to a dawn raid should cooperate and answer the specific enquiries of the competition authorities regarding the location of documents and files. If it is unclear whether a file may be protected by legal privilege or outside the scope of the investigation companies should ask to put it aside for review by external counsel. Avoid answering questions that go beyond indentifying the location of certain documents. Interrogations should be made in an appropriate setting. In Switzerland, at the end of a search, the competition authorities prepare a transcript describing the course of the search and the seized documents and files. This is the time when possibly privileged documents or such documents that are considered being outside the scope of the investigation can be put under seal. It is then for the Federal Criminal Court to decide on the company's objection.

Quashie: The first action that any business should take is to ensure that those executing the warrant are who they say they are and that the warrant is a *bona fide* document. It is important that the warrant is checked to ensure that the named entity is in fact the one that will be subject to the search; it is not unknown for warrants to be executed at the wrong address or for the named person to have vacated the premise prior to the warrant being executed. It is important that the information in the warrant is obtained and understood at this early stage by the business as it will be important to inform the business' legal advisers. At that point it will be useful to ask the officer in charge to speak on the telephone with the legal adviser who will then want to seek assurances from the officer in charge around legal professional privilege, how staff might be interviewed and agreement around how business critical data might be preserved before seizure by the search team. The legal team will also ensure that the execution of the warrant is appropriately handled and that the law enforcement officers are not overreaching their remit.

Tumani: The investigator's identification documents and mandate, be it a Commission Decision or a search warrant, should be reviewed to determine the scope and nature of the investigation. A copy of this should also be given to outside counsel. Investigators should be treated courteously and told that company personnel will cooperate with them. Investigators should be asked if they are willing to delay the start of the search to allow for outside counsel to attend. However, it should be noted that they are unlikely to agree save for possibly a

short delay. The company should consider devising an internal communications plan. Staff should not obstruct or frustrate the search operation. In particular, documents should not be destroyed or concealed. Outside parties should not be informed, and investigators should not be misled. It is advisable to accompany investigators so that the company can keep an inventory of documents copied and removed. The company should be prepared to make representations about privilege or relevance and to note any questions asked and responses that are given. Given the prevalence of IT, it will be advisable to identify specialist company IT personnel to manage the interface with the forensic IT investigators on the search team.

FW: Why should a company consider engaging external advisers to assist the process, in the event of potential legal proceedings and possible penalties?

Quashie: Legal advisers also play a key role in managing the authority's access to information. Certain business documents may be regarded as 'excluded material' or 'special procedure material' in accordance with the UK Police and Criminal Evidence Act 1984 (PACE) and other documents may be regarded as legally privileged material. These are technical legal definitions that need to be argued carefully with the officer in charge of the search. Equally, the search team might argue that in accordance with the Criminal Justice and Police Act 2001, Part 2, they will need to 'sweep' all material from the premises in order to sift and examine it elsewhere. In these circumstances it will be very difficult for the company's internal representatives to argue such technical issues if indeed they recognise them at all when they are caught up in the anxiety that a search operation will undoubtedly bring. The legal adviser will be well versed in such definitions and where appropriate can challenge, on legal grounds, the reasonableness of the proposed actions by the officer in charge when seizing material. Engaging the legal adviser at the outset enables the business to protect its interests in a rational, considered and lawful way.

Tumani: The presence of external counsel is often reassuring to a business in the midst of a stressful raid situation. Counsel may need to remind the company to ensure it does nothing which could be seen as frustrating the search operation. Counsel may need to challenge the relevance of, or assert privilege over, some documents. In addition, counsel may need to advise employees in relation to answering questions going beyond simply access to documents. Following the raid, ongoing involvement of counsel is key to supporting the company's interests both legally and practically, by ensuring that management time is not taken up by investigation proceedings which may otherwise be a significant distraction from the day to day business of the company.

Lauterburg: An important aspect in antitrust dawn raids is the question of whether the company should apply for leniency. Although in some cases competition authorities are willing to treat leniency applications submitted within a certain period of time – such as during the day the dawn raid took place – as having occurred at the same time for purposes of granting the same 'leniency discount', this is normally an issue which requires immediate expert advice. It is a decision which requires experience in spotting the relevant issues under time pressure. One should bear in mind with regard to leniency changes, to a certain extent, cooperation with the authorities can increase from merely 'being cooperative' with enquiries to submitting relevant information without being specifically asked. In this context, it is important to remember the relevant provision in the sanctions ordinance: "the undertaking shall submit to the competition authority all necessary information on the reporting undertaking itself, on the nature of the reported infringement of competition, on the undertakings participating in the infringement of

competition and on the affected or relevant markets". Again, external counsel can assist in safeguarding the company's rights and making sure that companies stick to the facts and, when answering questions, that they avoid making unwanted admissions during 'informal' questioning of employees. Furthermore, they can assist a company in developing an appropriate defence strategy.

FW: Post-dawn raid, what information does a company need to include in its audit or review of its response? What particulars would need to be submitted if an application for leniency is pursued?

Tumani: Following the raid, it is important to hold a post-mortem with all individuals involved and to produce a report containing a full note of those documents taken or copied, any questions asked and answers given and any differences of opinion between the company and the investigators. This should help the company and its counsel consider whether there is any need to approach the authority regarding the relevance, confidentiality or privilege of documents, whether any document or oral response to any questioning may require additional explanation and whether any internal investigations should be undertaken. In order to make an application for leniency, the company will likely need to submit, in specific detail, contemporaneous, incriminating evidence of any alleged cartel.

Lauterburg: Following an antitrust dawn raid, a company should immediately start analysing the records it has drafted during the dawn raid and transcripts and minutes drafted by the authority, as well as the documents that were seized or copied by the authority. Based on this it should evaluate the filing of a leniency application, if this has not already been done during the dawn raid. A leniency statement should attempt to put the documents that had already been seized by the authorities into the correct context. A statement on the facts explaining the circumstances of the alleged cartel infringement and the company's involvement should lay the ground work for a later statement of defence. If no leniency application is filed, the company has to wait for the competition authority to send further protocols. With regard to documents that are urgently needed for the ongoing business of the company, it should advise the authority that such documents should be sent back as soon as possible and that all documents are considered business secrets.

Quashie: A full debrief with the company's legal advisers should be held as soon as possible after the inspection to ensure recollections of the raid are fresh in mind and accurate. During the debrief, the review team should ensure it has as full a record as possible of the raid and the authority's particular areas of interest and investigation. This record should be reviewed, alongside the warrant and associated documents, with any information seized by the authorities to determine whether the focus of the authority's investigation can be determined and in turn how the business, on advice from its legal team, should respond. At that time it may be appropriate to undertake an internal review to establish the facts relating to the subject matter of the authorities' investigation, allowing the company to assess its legal position and potential exposure. It is important that any such review should be conducted under legal professional privilege. To assist any application for leniency, to the Office of Fair Trading for example, the company should be cooperative, and in the event anti-competitive conduct is identified during the review, the company should consider disclosing the findings to the Commission. Each case will be very fact specific and will need to be carefully considered from a strategic and tactical perspective, for example, based on the markets in which the business is engaged.

FW: What advice would you give companies on

establishing a unified and effective communications strategy to manage reputational risk during the investigation phase following a dawn raid?

Lauterburg: The press is usually quick to try and discover all sorts of information relating to the alleged infringement. Depending on the economic sector or the companies involved, there may or may not be a craving for sensation. In any case, to avoid potentially conflicting information, companies should make sure that press enquiries are channelled to one person. Press enquiries should be answered briefly – stating that the company is aware of the allegations and that it will cooperate with the authorities and nothing more. The same strategy should be followed *vis-à-vis* purchasers, which later may become potential claimants. Although a company's reputation may suffer when a dawn raid becomes public, there is nothing worse than a failed attempt to 'whitewash' and justify the company's conduct.

Quashie: It is important that in advance of a raid there is a very clear communication strategy in place in order to negate the impact of possible negative reporting. Depending on the facts and the nature of the raid, as a general rule it can be helpful if the legal representative makes a statement and stresses that whilst matters are under investigation it would be inappropriate for the business to make comment. The legal adviser should also provide advice around how the statement to the press might be structured and have it finessed, where appropriate, by a PR agency. Advice should also be sought as to whether a disclosure is required to the stock market and appropriate regulatory authorities, whether here in the UK or in the EU. At the beginning of the raid, a representative of the business should call the staff together to tell them what is happening, exactly what areas of the office are to be searched and to remind them that they should not obstruct officers in the execution of their duty. Unless the officer in charge of the search has specifically indicated that certain staff will be interviewed, then it is important to remind staff that they should refrain from speculation in any form and that should they receive any external requests for comment then the matter should be referred to the senior person appointed by the business to manage the investigation, who will in turn seek legal advice around its handling.

Tumani: There are likely to be two elements to any communications strategy deployed once news of an investigation becomes public. The first is a general announcement to the market. The second element is specific responses to likely queries from customers or third parties – whether they are concerned about anti-competitive practices in the case of a Commission raid or more general issues of focus relating to the work of other regulators. Consideration will need to be given to any notification to the company's insurers. It is important for a company's internal communications function to be involved from the outset so that all communications are aligned, and that staff are informed not to talk to the press unless specifically authorised to do so.

FW: To what extent can companies fully prepare for a dawn raid? What are the merits of establishing a dawn raid 'task force', for example?

Quashie: The truth is that companies can never fully prepare, unless they are aware of the problem, in which case one would hope they would have sought to respond appropriately in order to deal with it. However, preparation remains important. Staff can be trained via mock raids and by having an internal escalation process in place in the event of a raid. This should include having external legal advisers on standby establishing and assigning specific roles and responsibilities right through from the receptionist and the security team, to IT, HR and Legal. By preparing employees for a raid it provides comfort and confidence to manage the situation and ensures

the correct people are on site promptly to protect the business and oversee the raid. Many companies choose to set up a task force which is usually made up of the chief executive officer, chief financial officer, chief information officer and general counsel, along with a secretariat to record their decisions, and it is certainly advisable for an external legal adviser to be part of that core team. A record of discussions will be important later in any proceedings in showing how the business reacted and responded to the raid.

Tumani: A raid is a live dynamic situation and therefore surprises and unforeseen problems should be expected. However, it is wise to ensure that if a raid does occur, the company knows what to do and who to call. The plan could include a 'task force' which has been briefed on what to expect. The 'task force' could include employees who will be of assistance during the raid, a member of senior management in order to keep the board and senior management apprised of events, legal and compliance staff required to advise on privilege and confidentiality, an IT specialist who can support electronic document searches and collection and administrative or secretarial support for making copies of documents and maintaining an inventory of documents collected and questions asked and responses given. It should also include external counsel, who will be able to deploy a team to shadow investigators throughout the raid.

Lauterburg: Companies cannot *fully* prepare. Even the best internal processes require some level of improvisation. They can, however, establish processes on which they may rely in the case of an unexpected search. This should include having an internal alarm procedure that quickly puts on the scene the right managerial individuals with adequate skills and knowledge of what immediate steps must be taken.

FW: What lessons can be learned from high-profile dawn raids? How should a company go about designing and implementing guidelines and immediate response processes for employees?

Tumani: One of the key lessons to be learnt from previous raids is to make sure that nothing is done that could be construed as non-cooperation with the investigators. Previous raids have shown penalties imposed for refusing access, refusing to answer questions, shredding documents or breaching seals. To avoid similar outcomes, the company should have a dawn raid policy in place. This should be maintained by the legal department and distributed throughout the company, including to the receptionists who will likely be the first point of contact of the investigators. Key elements of the policy should include dealing with investigators on arrival, not destroying or concealing documents or disseminating information on the raid and not breaching any seal, and dealing with questions in a concise and accurate manner. The policy may also include suggested ways to reassure staff, and instructions to potentially send home those who are non-essential. Once a search has been successfully navigated, external counsel can seek to gain access to the detailed information supporting the search operation and consider potential litigation strategies.

Lauterburg: A company's guidelines should outline the scenario of an antitrust dawn raid and the company should clearly indentify the roles that staff should take in the event of a raid. Equally, the tasks that each individual should undertake in the event of a dawn raid should also be set out, as well as the rooms that can be used as copy room, meeting room, and so on, during a dawn raid. Such guidelines should also list the rights and duties of the parties and, importantly, stress the fact that cooperation is imperative. Such guidelines can avoid nervousness during a dawn raid.

Quashie: One of the highest profile raids of recent

times was the SFO's ill-fated raid on the Tchenguiz brothers' business premises. The raids were undertaken on the basis of warrants which, during judicial review proceedings, were later deemed to be illegal and were based on "false and fraudulent allegations". This highlighted a key lesson – do not take warrants at face value. Consider them, analyse them and don't be afraid to challenge them. Challenging a warrant does not mean you are being difficult – rather, you are protecting your company and your employees. A further lesson is that in the event of a raid, companies should avoid focusing their attention just inwardly. There are a number of risks in doing so, particularly from a PR perspective. For example, it is important that the officer in charge of the search should be asked to arrange for any police cars parked outside of the premise to perhaps be parked at the rear, if possible. This may enable any items seized to be removed via the rear of the building into police vehicles without the potential for press photographers capturing a snap for the next edition. PACE states that "searches must be conducted with due consideration for the property and privacy of the occupier and with no more disturbance than necessary". It is important that officers are reminded of their duty under the Act. As with all internal guidelines, policies and procedures, it is important that dawn raid processes are bespoke, practical and implemented effectively. Companies should also consider a number of questions. Are the members of the 'task force' regular business travellers or off-site? Are the company's legal advisers located close enough to respond promptly in the event of a raid? Is there a list of key contacts in place? Are privileged document stored separately from other material? Are employees effectively trained in respect of their roles and responsibilities? It is important that specialist legal advice is obtained in advance of a raid to ensure your business is well equipped to manage what can be a difficult, stressful and potentially damaging experience, even where the raid and any subsequent investigation does not result in prosecution. ■